(24,999)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 716.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Page
Caption	a
Addresses of counsel	1
Transcript of record from the district court of the United States for the southern district of California	2
Writ of error	2
Citation and service	5
Complaint in case 106	7
Summons in case 106 and return	14
Answer in case 106	16
Demurrer to answer in case 106	20
Order sustaining demurrer in case 106	25
Amended answer in case 106	27
Complaint in case 243	31
Answer in case 243	55
Order consolidating cases Nos. 106 and 243	73
Verdict	74
Judgment	75

& Detweiler (Inc.), Printers, Washington, D. C., November 30, 1915.

Page

Clerk's certificate to judgment roll 79
Bill of exceptions 81
Stipulation of facts 82
Testimony of Carl P. Smith 91
Instructions of the court to jury 110
Exception No. 1 112
Stipulation for settlement and allowance of bill of exceptions 114
Order settling and allowing bill of exceptions 115
Defendant's Exhibit—The hours of service law 116
Assignment of errors 127
Petition for writ of error and supersedeas 133
Order allowing writ of error 135
Order staying proceedings 137
Bond on writ of error 139
Præcipe for transcript of record 142
Clerk's certificate 143
Order of submission 140
Opinion, Ross, J. 151
Judgment 168
Order denying petition for rehearing 170
Order staying proceedings and mandate, etc. 171
Order staying mandate to June 10, 1915, etc. 172
Præcipe for transcript of record, etc. 173
Order staying mandate to October 18, 1915 175
Order allowing plaintiff in error time to move for and perfect proceedings to obtain a review of judgment by supreme court 176
Petition for writ of error 177
Assignment of errors 180
Order allowing writ of error, etc. 189
Bond on writ of error 191
Præcipe for transcript of record 195
Clerk's certificate 196
Writ of error 201
Clerk's return to writ of error 203
Citation and service 204

No. 2412

United States

Circuit Court of Appeals

For the Ninth Circuit.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filmer Bros. Co. Print., 330 Jackson St., S. F., Cal.

Names and Addresses of Attorneys.

For Plaintiff in Error, San Pedro, Los Angeles & Salt Lake Railroad Company:

PENNEL CHERRINGTON, Esq., 502–4 Pacific Electric Building, Los Angeles, California;

A. S. HALSTED, Esq., 502–4 Pacific Electric Building, Los Angeles, California;

W. F. PALMER, Esq., 502–4 Pacific Electric Building, Los Angeles, California, and

F. R. McNAMEE, Esq., 502–4 Pacific Electric Building, Los Angeles, California.

For Defendant in Error, The United States of America:

ALBERT SCHOONOVER, Esq., U. S. Attorney, Los Angeles, California;

MONROE C. LIST, Esq., Special Assistant U. S. Attorney, c/o Interstate Commerce Commission, Washington, D. C.;

HARRY R. ARCHIBALD, Esq., Assistant U. S. Attorney, Los Angeles, California.

[3*]

*Page-number appearing at foot of page of original certified Record.

In the United States District Court for the Southern District of California, Southern Division.

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

Writ of Error [Original].

United States of America,—ss.

The President of the United States, to the Hon. OLIN WELLBORN, Judge of the United States District Court for the Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between San Pedro, Los Angeles & Salt Lake Railroad Company, plaintiff in error, and The United States of America, defendant in error, a manifest error hath hap-

pened, to the damage of San Pedro, Los Angeles & Salt Lake Railroad Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that [4] you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 3d day of April, 1914.

[Seal] WM. M. VAN DYKE,
Clerk of the United States District Court for the Southern District of California, Southern Division.

By Chas. N. Williams,
Deputy Clerk.

Allowed this 3d day of April, 1914.

OLIN WELLBORN,
United States Judge.

I hereby certify that a copy of the within Writ of Error was on the 3d day of April, 1914, lodged in the clerk's office of the said United States District Court for the Southern District of California, Southern Division, for said defendant in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern Dist. of California, So. Division.

By Chas. N. Williams,
Deputy Clerk. [5]

[Endorsed]: Nos. 106 and 243 Civil. U. S. District Court, Ninth District, Southern District of California. The United States of America vs. San Pedro, Los Angeles & Salt Lake Railroad Co., Defendant. Writ of Error. Filed Apr. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [6]

In the United States District Court for the Southern District of California, Southern Division.

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Defendant.

Citation in Error [Original].

United States of America, to the United States of America, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, thirty days from and after the day this citation bears date, pursuant to Writ of Error filed in the clerk's office of the United States District Court for the Southern District of California, Southern Division, sitting at Los Angeles, wherein San Pedro, Los Angeles & Salt Lake Railroad Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Hon. OLIN WELLBORN, Judge of the United States District Court, this 3d day of April, 1914.

OLIN WELLBORN,
U. S. District Judge. [7]

Service of the within Citation is hereby admitted, and a copy thereof accepted, this 3d day of April, 1914.

ALBERT SCHOONOVER,
HARRY R. ARCHBALD,
Attorneys for Plaintiff. [8]

[Endorsed]: Nos. 106 and 243 Civil. U. S. District Court, Ninth District, Southern District of California. The United States of America vs. San Pedro, Los Angeles & Salt Lake Railroad Co. Citation in Error. Filed Apr. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [9]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Defendant. [10]

[Complaint in Case No. 106.]

In the District Court of the United States for the Southern District of California, Southern Division.

No. ——.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Defendant.

Now comes the United States of America, by Aloysius I. McCormick, United States Attorney for the Southern District of California, and brings this action on behalf of the United States against the San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation organized and doing business under the laws of the State of Utah, and having an office and place of business at Kelso in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request

of the Interstate Commerce Commission, and upon information furnished by said Commission. [11]

FOR A FIRST CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a corporation and a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, during the twenty-four hour period beginning at the hour of 8:00 o'clock, A. M., on January 19, 1911, at its office and station at Kelso, in the State of California, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to wit, J. N. Grandee, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to wit, from said hour of 8:00 o'clock, A. M., on January 19, 1911, to the hour of 8:00 o'clock, P. M., on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [12]

FOR A SECOND CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein a corporation and a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, during the twenty-four hour period beginning at the hour of 8:00 o'clock P. M., on January 19, 1911, at its office and station at Kelso, in the State of California, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to wit, W. T. Dugan to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to wit, from said hour of 8:00 o'clock, P. M. on January 19, 1911, to the hour of 8:00 o'clock, A. M., on January 20, 1911.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affect-

ing the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [13]

FOR A THIRD CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a corporation and a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, during the twenty-four hour period beginning at the hour of 8:00 o'clock P. M., on January 20, 1911, at its office and station at Kelso, in the State of California, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to wit, W. T. Dugan, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to wit, from said hour of 8:00 o'clock P. M., on January 20, 1911, to the hour of 8:00 o'clock A. M., on January 21, 1911.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph

or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [14]

FOR A FOURTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a corporation and a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, during the twenty-four hour period beginning at the hour of 2:00 P. M., on January 18, 1911, at its office and station at Otis, in the State of California, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to wit, J. B. Foster, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to wit, from said hour of 2:00 o'clock P. M., on January 18, 1911, to the hour of 4:30 o'clock A. M., on January 19, 1911.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said em-

ployee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [15]

FOR A FIFTH CAUSE OF ACTION

plaintiff alleges that said defendant is and was during all the times mentioned herein a corporation and a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, during the twenty-four-hour period beginning at the hour of 1:20 o'clock A. M., on January 18, 1911, at its office and station at Otis, in the State of California, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to wit, O. H. Perry, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to wit, from said hour of 1:20 o'clock, A. M., on January 18, 1911, to the hour of 2:00 o'clock P. M. on said date.

Plaintiff further alleges that during all the times

mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [16]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of two thousand five hundred dollars and its costs herein expended.

A. I. McCORMICK,
United States Attorney.

[Endorsed]: No. 106 Civil. In the District Court of the United States, for the Sou. Dist. of California. United States of America, Plaintiff, vs. San Pedro, Los Angeles & Salt Lake Railroad Company, Defendant. Complaint. Filed Sep. 15, 1911, at 2 min. past 12 o'clock P. M. E. H. Owen, Clerk. ————, Deputy. [17]

[Summons in Case No. 106.]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Defendant.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Los Angeles, County of Los Angeles.

The President of the United States of America, Greeting: To San Pedro, Los Angeles & Salt Lake Railroad Company, a Corporation.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the District Court of the United States, in and for the Southern District of California, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said Court, in the City of Los Angeles, County of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover of defendant the sum of two Thousand Five Hundred ($2500.00)

Dollars and costs expended, alleged to be due for violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page [18] 1415). Reference is hereby had to the complaint on file herein for particulars (a copy of which is hereunto attached), said complaint containing five causes of action, and praying for judgment of $500.00 upon each and every of said cause of action, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the Court for the relief demanded in the complaint.

WITNESS, the Honorable OLIN WELLBORN, Judge of the District Court of the United States, in and for the Southern District of California, this 15th day of September, in the year of our Lord one thousand nine hundred and eleven, and of our Independence the one hundred and thirty-sixth.

[Seal]

E. H. OWEN,
Clerk.

By C. E. Scott,
Deputy Clerk.

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY, that I received the within writ on the 20th day of September, 1911, and personally served the same on the 21st day of September, 1911, by delivering to and leaving with Mr. R. E. Wells, Gen. Mgr. San Pedro, Los Angeles & Salt

Lake R. R. Co., said defendant named therein, personally, at the County of Los Angeles, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by E. H. Owen, attached thereto.

Los Angeles, Sept. 21, 1911.

LEO V. YOUNGWORTH,
U. S. Marshal.
By E. Dingle,
Deputy. [19]

[Endorsed]: Marshal's Civil Docket No. 1778. No. 106 Civil. U. S. District Court, Southern District of California, Southern Division. United States of America vs. San Pedro, Los Angeles & Salt Lake Railroad Co. Original Summons. A. I. McCormick, Plaintiff's Attorney. Filed Sep. 22, 1911, at 10 min. past 10 o'clock A. M. E. H. Owen, Clerk. C. E. Scott, Deputy. [20]

In the District Court of the United States, for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

Answer [in Case No. 106].

Comes now the defendant in the above-entitled ac-

tion, and for answer to the complaint filed herein, avers:

FIRST CAUSE OF ACTION.

For answer to the first cause of action, defendant avers that an emergency existed which made it necessary for this defendant to require the said J. N. Grande mentioned in said first cause of action to be and remain on duty during all of the times and at the place mentioned in said first cause of action, in order to preserve the lives of passengers upon the trains of this defendant, and to avoid collisions and the destruction of life and property; and defendant avers that the employment of said J. N. Grandee during the hours aforesaid was unavoidable and such as is permitted by section 2 of the Act referred to in said complaint.

SECOND CAUSE OF ACTION.

For answer to the second cause of action, defendant avers that an emergency existed which made it necessary for this defendant to require the said W. T. Dugan mentioned in said second cause of action to be and remain on duty during all of the times and at the place mentioned in said second cause of action, in order to preserve the lives of passengers upon the trains of this defendant, and to avoid collisions and the destruction of life and property; and defendant avers that the employment of said W. T. Dugan during the hours aforesaid was unavoidable and such as is permitted by section [21] 2 of the Act referred to in said complaint.

THIRD CAUSE OF ACTION.

For answer to the third cause of action, defendant

avers that an emergency existed which made it necessary for this defendant to require the said W. T. Dugan mentioned in said third cause of action to be and remain on duty during all of the times and at the place mentioned in said third cause of action, in order to preserve the lives of passengers upon the trains of this defendant, and to avoid collisions and the destruction of life and property; and defendant avers that the employment of said W. T. Dugan during the hours aforesaid was unavoidable and such as is permitted by section 2 of the Act referred to in said complaint.

FOURTH CAUSE OF ACTION.

For answer to the fourth cause of action, defendant avers that an emergency existed which made it necessary for this defendant to require the said J. B. Foster mentioned in said fourth cause of action to be and remain on duty during all of the times and at the place mentioned in said fourth cause of action, in order to preserve the lives of passengers upon the trains of this defendant and to avoid collisions and the destruction of life and property; and defendant avers that the employment of said J. B. Foster during the hours aforesaid was unavoidable and such as is permitted by section 2 of the Act referred to in said complaint.

FIFTH CAUSE OF ACTION.

For answer to the fifth cause of action, defendant avers that an emergency existed which made it necessary for this defendant to require the said O. H. Perry mentioned in said fifth cause of action to be and remain on duty during all of the times and at the

place mentioned in said fifth cause of action in order to preserve the lives of passengers upon the trains of this defendant and to avoid collisions and the destruction of life and property; and defendant avers that the employment of said O. H. Perry during the hours aforesaid was unavoidable and such as is permitted by section [22] 2 of the Act referred to in said complaint.

WHEREFORE, defendant says that it has not in aught violated or transgressed any of the provisions of the Act aforesaid, and it asks to be discharged herefrom without cost, and for all other relief proper in the premises.

A. S. HALSTED,
W. F. PALMER,
Attorneys for Defendant.

State of California,
County of Los Angeles,—ss.

W. H. Comstock, being first duly sworn, deposes and says: That he is the Secretary of San Pedro, Los Angeles & Salt Lake Railroad Company, the defendant in the above-entitled action; that he has heard read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information and belief, and as to those matters he believes it to be true.

W. H. COMSTOCK.

Subscribed and sworn to before me, this 4th day of October, 1911.

[Seal]

AMELIA GUEST,
Notary Public.

[Endorsed]: No. 106 Civil. U. S. District Court, Southern District of California. United States of America, Plaintiff, vs. San Pedro, Los Angeles, & Salt Lake Railroad Co., Defendant. Answer. Filed October 4, 1911 E. H. Owen, Clerk. By C. E. Scott, Deputy Clerk. Received copy of the within answer this 4 day of Oct., 1911. A. I. McCormick, U. S. Atty. By G. E. C., Asst. Solicitor for Plaintiff, 502–4 Pacific Electric Bldg., Los Angeles, Cal. A. S. Halsted & W. F. Palmer, Solicitors for Defendant. [23]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Defendant.

Demurrer to Answer [in Case No. 106].

Comes now the plaintiff, United States of America, and demurs to the answer of the defendant in the above-entitled action on the following grounds, to wit:

I.

DEMURRER TO ANSWER TO FIRST CAUSE OF ACTION.

Plaintiff demurs to defendant's answer to the

first cause of action on the following grounds:

A. That said answer to said first cause of action does not, nor does any part thereof, state facts sufficient to constitute a defense to plaintiff's said first cause of action.

B. That said answer is *uncertain* in this, that it cannot be ascertained therefrom what the facts are from which defendant draws its conclusion "that an emergency existed which made it necessary for this defendant to require the said J. N. Grandee * * * to be and remain on duty" at the times charged in plaintiff's complaint; or what the facts are from which the defendant concludes that the detention of the said employee in service, as alleged, was "unavoidable" and such as is permitted by the Act. [24]

C. That said answer to said first cause of action is *unintelligible* for the same reasons for which it is herein alleged to be uncertain.

II.

DEMURRER TO ANSWER TO SECOND CAUSE OF ACTION.

Plaintiff demurs to defendant's answer to the second cause of action on the following grounds:

A. That said answer to said second cause of action does not, nor does any part thereof, state facts sufficient to constitute a defense to plaintiff's said second cause of action.

B. That said answer is uncertain in this, that it cannot be ascertained therefrom what the facts are from which defendant draws its conclusion "that an emergency existed which made it necessary for this

defendant to require the said W. T. Dugan * * * to be and remain on duty" at the times charged in plaintiff's complaint; or what the facts are from which the defendant concludes that the detention of the said employee in service, as alleged, was "unavoidable" and such as is permitted by the Act.

C. That said answer to said second cause of action is *unintelligible* for the same reasons for which it is herein alleged to be uncertain.

III.

DEMURRER TO ANSWER TO THIRD CAUSE OF ACTION.

Plaintiff demurs to defendant's answer to the third cause of action on the following grounds:

A. That said answer to said third cause of action does not, nor does any part thereof, state facts sufficient to constitute a defense to plaintiff's said third cause of action. [25]

B. That said answer is uncertain in this, that it cannot be ascertained therefrom what the facts are from which defendant draws its conclusion "that an emergency existed which made it necessary for this defendant to require the said W. T. Dugan * * * to be and remain on duty" at the times charged in plaintiff's complaint; or what the facts are from which the defendant concludes that the detention of the said employee in service, as alleged, was "unavoidable" and such as is permitted by the Act.

C. That said answer to said third cause of action is *unintelligible* for the same reasons for which it is herein alleged to be uncertain.

IV.

DEMURRER TO ANSWER TO FOURTH CAUSE OF ACTION.

Plaintiff demurs to defendant's answer to the fourth cause of action on the following grounds:

A. That said answer to said fourth cause of action does not, nor does any part thereof, state facts sufficient to constitute a defense to plaintiff's said fourth cause of action.

B. That said answer is uncertain in this, that it cannot be ascertained therefrom what the facts are from which defendant draws its conclusion "that an emergency existed which made it necessary for this defendant to require the said J. B. Foster * * * to be and remain on duty" at the times charged in plaintiff's complaint; or what the facts are from which the defendant concludes that the detention of the said employees in service, as alleged, was "unavoidable" and such as is permitted by the Act. [26]

C. That said answer to said fourth cause of action is *unintelligible* for the same reasons for which it is herein alleged to be uncertain.

V.

DEMURRER TO ANSWER TO FIFTH CAUSE OF ACTION.

Plaintiff demurs to defendant's answer to the fifth cause of action on the following grounds:

A. That said answer to said fifth cause of action does not, nor does any part thereof, state facts sufficient to constitute a defense to plaintiff's said fifth cause of action.

B. That said answer is uncertain in this, that it cannot be ascertained therefrom what the facts are from which defendant draws its conclusion "that an emergency existed which made it necessary for this defendant to require the said O. H. Perry * * * to be and remain on duty" at the times charged in plaintiff's complaint; or what the facts are from which the defendant concludes that the detention of the said employee in service, as alleged, was "unavoidable" and such as is permitted by the Act.

C. That said answer to said fifth cause of action is *unintelligible* for the same reasons for which it is herein alleged to be uncertain.

WHEREFORE plaintiff prays that its demurrer to said answer to said several counts be sustained and that plaintiff have judgment against defendant as prayed.

A. I. McCORMICK,
United States Attorney,
GEO. E. CRYER,
Asst. United States Attorney,
Attorneys for Plaintiff.

[Endorsed]: No. 106 Civil. In the District Court of the United [27] States for the Sou. Dist. of California, Southern Division. United States of America, Plaintiff, vs. San Pedro, Los Angeles and Salt Lake Railroad Company, Defendant. Demurrer to Answer. Filed Oct. 11, 1911. E. H. Owen, Clerk. By C. E. Scott, Deputy. Copy received Oct. 11, 1911. A. S. Halsted, W. F. Palmer, Attys. for Defendant. [28]

[Order in Case No. 106 Sustaining Demurrer to Answer, etc.]

At a stated term, to wit, the July Term, A. D. 1912, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the eighth day of July, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable OLIN WELLBORN, District Judge.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILWAY COMPANY,
Defendant.

This cause coming on at this time to be further heard on plaintiff's demurrer to defendant's answer: Dudley W. Robinson, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; W. F. Palmer, Esq., appearing as counsel for defendant; and said cause having been further argued, on behalf of the United States, by Dudley W. Robinson, Esq., of counsel for the United States; and having also been further argued on behalf of the defendant by W. F. Palmer, Esq., of counsel for defendant, and having been further argued on behalf of the United States in reply by Dudley W. Robinson, Esq., Assistant U. S. Attorney, of counsel for the United States; and said cause having been submitted to the

Court for its consideration and decision; it is now by the Court ordered that said demurrer of plaintiffs to the answer of the defendant be, and the same hereby is sustained, with leave to said defendant to amend its answer within thirty (30) days, if it shall be so advised; whereupon defendant requests leave to carry the demurrer to defendant's answer back and sustain the same to the complaint herein, which request is by [29] the Court denied; and it is ordered that defendant be and he hereby is granted ten (10) days within which to prepare and serve a bill of exceptions.

[Endorsed]: No. 106 Civil. United States District Court, Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. San Pedro, Los Angeles & Salt Lake Railroad Company, Defendant. Copy of Minute Order. Filed October 10, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [30]

ORIGINAL.

In the District Court of the United States, for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

Amended Answer [in Case No. 106].

Comes now the defendant in the above-entitled action, and for its Amended Answer to the complaint filed herein says:

FIRST CAUSE OF ACTION.

For amended answer to the first cause of action this defendant avers that at the time alleged in said paragraph of the complaint, the force of telegraphers employed at Kelso consisted of an Agent operator, whose hours were from 8 o'clock A. M. to 4 o'clock P. M., and two telegraph operators, whose hours were from 4 o'clock P. M. to 12 o'clock midnight, and from 12 o'clock midnight to 8 o'clock A. M. respectively; that on January 16th, 1911, one W. F. Starkey was one of the telegraph operators so employed by defendant at said station, and his regular hours were from 4 o'clock P. M. to 12 o'clock midnight; that on said 16th day of January, 1911, the said Starkey was taken suddenly ill and incapacitating him from service as a telegraph operator; that said Kelso station is a helper terminal and an important telegraph station, and an office which it is necessary to keep in operation continuously during the entire 24 hours of each day; that at the time said Starkey was taken ill there was no available telegraph operator at Kelso to replace him, and it was necessary for this defendant to procure another operator and send him to said station, and that as soon as possible this defendant did procure an operator, V. G. Hann, and send him to Kelso for service to

take the place of said Starkey, and the said Ham began his term of service as soon as possible, to wit, January 20th, 1911. [31]

Wherefore, this defendant says that by reason of the aforesaid facts, an emergency arose and existed which required and made it necessary and imperative for this defendant to require the said J. N. Grandee to work overtime as alleged in the complaint.

SECOND CAUSE OF ACTION.

And for its amended answer to the second cause of action mentioned in said complaint, this defendant re-avers each and every allegation contained in its answer to the first cause of action, and further says that by reason of said facts an emergency arose and existed which required and made it necessary and imperative for this defendant to require the said W. T. Dugan to work overtime as alleged in the complaint.

THIRD CAUSE OF ACTION.

And for its amended answer to the third cause of action mentioned in said complaint, this defendant re-avers each and every allegation contained in its answer to the first cause of action, and further says that by reason of said facts an emergency arose and existed which required and made it necessary and imperative for this defendant to require the said W. T. Dugan to work overtime as alleged in the complaint.

FOURTH CAUSE OF ACTION.

And for its amended answer to the fourth cause of action mentioned in said complaint, this defend-

ant avers that Otis is a freight division terminal upon its said line of railroad, and it is necessary to and this defendant does, keep in its employ three telegraph operators, whose regularly assigned hours are from 6 o'clock A. M. to 2 o'clock P. M.; from 2 o'clock P. M. to 10 o'clock P. M., and from 10 o'clock P. M. to 6 o'clock A. M. respectively; that on January 18th, 1911, the defendant had employed as its [32] telegraphing force at said Otis station, W. Casey, O. H. Perry and J. B. Foster; that on said January 19th, 1911, the said Casey, whose hours were from 10 o'clock P. M. to 6 o'clock A. M., appeared at defendant's telegraph office for duty in a state of helpless intoxication and could not safely handle train orders or transact any other business over the wires, and this defendant performed its duty by refusing to permit said Casey to go to work, and immediately proceeded to find a successor to said Casey; that no extra operator could be found at Otis to take the place of said Casey, and the said O. H. Perry and said J. B. Foster were required and did work overtime to supply the place of said Casey; that as soon as possible thereafter, to wit, January 19th, 1911, this defendant procured the services of one W. H. Williams and caused him to report at said telegraph office at Otis and take the place of said Casey, and that the said Williams did take the place of said Casey at as early a date as practicable.

Wherefore, this defendant says that by reason of the aforesaid facts, an emergency arose and existed which required and made it necessary and imperative for this defendant to require the said O. H.

Perry and said J. B. Foster to work overtime as alleged in said complaint.

FIFTH CAUSE OF ACTION.

And for its amended answer to the fifth cause of action mentioned in said complaint, this defendant re-avers all of the allegations contained in its amended answer to the fourth cause of action above, and further says that by reason of the facts aforesaid, an emergency arose and existed which required and made it necessary and imperative for this defendant to require the said O. H. Perry and said J. B. Foster to work overtime as alleged in said complaint.

WHEREFORE, this defendant says that it has not in aught [33] violated or transgressed any of the provisions of the Act mentioned in the complaint, and asks to be discharged herefrom without cost, and for all other relief proper in the premises.

A. S. HALSTED,
W. F. PALMER,
Attorneys for Defendant.

State of California,
County of Los Angeles,—ss.

W. H. Comstock, being first duly sworn, deposes and says, that he is the Secretary of San Pedro, Los Angeles & Salt Lake Railroad Company, defendant in the above-entitled action; that he has heard read the foregoing Amended Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as

to those matters he believes it to be true.

W. H. COMSTOCK.

Subscribed and sworn to before me, this 7th day of August, 1912.

[Seal] FRANCIS J. MIEDING,
Notary Public.

[Endorsed]: No. 106 Civil. U. S. District Court, Ninth Circuit, Southern District of California. The United States of America, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., Defendant. Amended Answer. Filed Aug. 7, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within answer this 7 day of Aug., 1912. A. I. McCormick. By Regan. Solicitor for ————. A. S. Halsted, W. F. Palmer, 502–4 Pacific Electric Bldg., Los Angeles, Cal., Solicitors for Defendant. [34]

[Complaint in Case No. 243.]

In the District Court of the United States, for the Southern District of California, ——— Division.

1838.

No. ——.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

Now comes the United States of America, by Aloysius I. McCormick, United States Attorney for the Southern District of California, and brings this action on behalf of the United States against the San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation organized and doing business under the laws of the State of Utah, and having an office and place of business at Los Angeles, in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission. [35]

FOR A FIRST CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 12:30 o'clock P. M. on October 1, 1912, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Crestmore, in said State, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, C. A. Cochrane, to be and remain on duty as such for a longer period than sixteen con-

secutive hours, to wit, from said hour of 12:30 o'clock P. M., on said date, to the hour of 10:40 o'clock A. M., on October 2, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra east and west drawn by its own locomotive engine No. 3639, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[36]

FOR A SECOND CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 12:30 o'clock P. M. on October 1, 1912, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Crestmore, in said State, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, A. B. Kleir, to be and remain on duty as such for a longer period than sixteen consecutive

hours, to wit, from said hour of 12:30 o'clock P. M. on said date to the hour of 10:40 o'clock A. M. on October 2, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra east and west drawn by its own locomotive engine No. 3639, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [37]

FOR A THIRD CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock P. M. on October 3, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Los Angeles, in the State of California, within the jurisdiction of this Court required and permitted its certain conductor and employee, to wit, G. D. Brown, to be and remain on duty as such for a longer period than six-

teen consecutive hours, to wit, from said hour of 5:00 o'clock P. M., on said date, to the hour of 8:00 o'clock P. M. on October 4, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train number 1 drawn by its own locomotive engine No. 3434, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars. [38]

FOR A FOURTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock P. M. on October 3, 1912, upon its line of railroad at and between the stations of Las Vegas in the State of Nevada, and Los Angeles, in the State of California, within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit, R. A. Edwards, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00

o'clock P. M., on said date, to the hour of 8:00 o'clock P. M., on October 4, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train number 1 drawn by its own locomotive engine No. 3424, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars. [39]

FOR A FIFTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock P. M. on October 3, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Los Angeles, in the State of California, within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit, H. F. Berringer, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock P. M. on said date, to the hour of 8:00

o'clock P. M. on October 4, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train number 1 drawn by its own locomotive engine No. 3434, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [40]

FOR A SIXTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on October 4, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Los Angeles, in the State of California, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit, J. P. Fitzpatrick, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:30 o'clock A. M. on said date to the hour of

6:25 o'clock A. M. on October 5, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train number 7 drawn by its own locomotive engine No. 3433, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [41]

FOR A SEVENTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M. on October 4, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Los Angeles, in the State of California, within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit, J. S. Roberts, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:30 o'clock A. M. on said date, to the hour of 6:25 o'clock

A. M. on October 5, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train number 7 drawn by its own locomotive engine No. 3433, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [42]

FOR AN EIGHTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M. on October 4, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Los Angeles, in the State of California, within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit, C. A. Carter, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:30 o'clock A. M. on said date to the hour of 6:25 o'clock

A. M. on October 5, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train number 7 drawn by its own locomotive engine No. 3433, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [43]

FOR A NINTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 2:30 o'clock P. M. on October 7, 1912, upon its line of railroad at and between the stations of San Bernardino, in the State of California, and Pomona, in said State, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit, Charles W. Madden, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 2:30 o'clock

P. M. on said date to the hour of 2:40 o'clock P. M. on October 8, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its locomotive engine No. 3617, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [44]

FOR A TENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 2:30 o'clock P. M. on October 7, 1912, upon its line of railroad at and between the stations of San Bernardino, in the State of California, and Pomona, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit, Joe Glynn, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 2:30 o'clock P. M.

on said date to the hour of 2:40 o'clock P. M. on October 8, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its locomotive engine No. 3617, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [45]

FOR AN ELEVENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock P. M. on October 8, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Scott, in the State of California, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit, H. P. Mitchell to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock

P. M. on said date to the hour of 10:30 o'clock A. M. on October 9, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3669, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [46]

FOR A TWELFTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock P. M. on October 8, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Scott, in the State of California, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, C. S. Caskey, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00

o'clock P. M. on said date to the hour of 10:30 o'clock A. M. on October 9, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3669, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [47]

FOR A THIRTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 8:45 o'clock P. M. on October 13, 1912, upon its line of railroad at and between the stations of Otis, in the State of California, and San Bernardino, in said State, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, O. A. Weeks, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 8:45

o'clock P. M. on said date to the hour of 3:55 o'clock P. M. on October 14, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 81 and extra west drawn by its own locomotive engine No. 3666, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [48]

FOR A FOURTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 8:45 P. M. on October 13, 1912, upon its line of railroad at and between the stations of Otis, in the State of California, and San Bernardino, in said State, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, Jess All, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 8:45 o'clock P. M.

on said date to the hour of 3:55 o'clock P. M. on October 14, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 81 and extra west drawn by its own locomotive engine No. 3666, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[49]

FOR A FIFTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 4:15 o'clock P. M. on October 16, 1912, upon its line of railroad at and between the stations of San Bernardino, in the State of California, and Los Angeles, in said State, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, J. G. Allison, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of

4:15 o'clock P. M. on said date to the hour of 9:45 o'clock A. M. on October 17, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3629, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[50]

FOR A SIXTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 4:15 o'clock P. M. on October 16, 1912, upon its line of railroad at and between the stations of San Bernardino, in the State of California, and Los Angeles, in said State, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, F. Thompson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 4:15

o'clock P. M. on said date to the hour of 9:45 o'clock A. M. on October 17, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west, drawn by its own locomotive engine No. 3629, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[51]

FOR A SEVENTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at at the hour of 6:15 o'clock P. M on October 18, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Otis, in the State of California, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, Joel V. Noblitt, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of

6:15 o'clock P. M. on said date to the hour of 11:40 o'clock A. M. on October 19, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3666, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [52]

FOR AN EIGHTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 6:15 o'clock P. M. on October 18, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Otis, in the State of California, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, H. O. Johnson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 6:15 o'clock

P. M. on said date to the hour of 11:40 o'clock A. M. on October 19, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3666, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [53]

FOR A NINETEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock A. M. on October 27, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Otis, in the State of California, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, J. C. Frazier, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock

A. M. on said date to the hour of 11:00 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3668, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [54]

FOR A TWENTIETH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock A. M. on October 27, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Otis, in the State of California, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, L. Cruncleston, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00

o'clock A. M. on said date to the hour of 11:00 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3668, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [55]

FOR A TWENTY-FIRST CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 3:40 o'clock P. M. on October 31, 1912, upon its line of railroad at and between the stations of San Bernardino, in the State of California, and Ontario, in said State, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, Charles W. Madden, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:40

o'clock P. M. on said date to the hour of 10:00 o'clock A. M. on November 1, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3627, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [56]

FOR A TWENTY-SECOND CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour 3:40 o'clock P. M. on October 31, 1912, upon its line of railroad at and between the stations of San Bernardino, in the State of California, and Ontario, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit, Joe Glynn, to be and remain on duty as such for a longer period than sixteen con-

secutive hours, to wit, from said hour of 3:40 o'clock P. M. on said date to the hour of 10:00 o'clock A. M. on November 1, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its locomotive engine No. 3627, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [57]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of eleven thousand dollars and its costs herein expended.

A. I. McCORMICK,
United States Attorney.
HARRY R. ARCHBALD,
Asst. U. S. Attorney.

[Endorsed]: No. 243 Civil. In the District Court of the United States, for the Sou. Dist. of California, Southern Division. United States of America, Plaintiff, vs. San Pedro, Los Angeles & Salt Lake Railroad Company, Defendant. Complaint. Filed Mar. 7, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [58]

In the District Court of the United States for the Southern District of California, Southern Division.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Defendant.

Answer [in Case No. 243].

Comes now the defendant, and for its answer to the complaint of the plaintiff on file herein, says:

I.

That answering the first cause of action therein, it denies that beginning at the hour of 12:30 o'clock P. M., on October 1st, 1912, upon its line of railroad, at or between the stations of Los Angeles, California, and Crestmore, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, C. A. Cochrane, to be or remain on duty as such, or at all, for a longer period than 16 consecutive hours.

Denies that the said Cochrane was so on duty from said hour of 12:30 o'clock P. M., on October 1st, 1912, until the hour of 10:40 o'clock A. M., on October 2d, 1912, or longer than until the hour of 4:30 o'clock A. M., of said October 2d, 1912.

Denies that said engineer, C. A. Cochrane, was required or permitted to be or remain on duty as set

out in said first cause of action, or was engaged in or connected with the movement of defendant's train extra east and west, or any other train, drawn by its own locomotive engine No. 3639, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said first cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum. [59]

II.

That answering the second cause of action therein, it denies that beginning at the hour of 12:30 P. M., on October 1st, 1912, upon its line of railroad, at or between the stations of Los Angeles, California, and Crestmore, California, and within the jurisdiction of this court, or at any other place, it required or permitted its fireman, A. B. Kleir, to be or remain on duty as such, or at all, for a longer period than 16 consecutive hours;

Denies that said Kleir was so on duty from said hour of 12:30 o'clock P. M., on October 1st, 1912, until the hour of 10:40 o'clock A. M., on October 2d, 1912, or longer than until the hour of 4:30 o'clock A. M., of said October 2d, 1912.

Denies that said fireman, A. B. Kleir, was required or permitted to be or remain on duty as set out in said second cause of action, or was engaged in or connected with the movement of defendants train extra east and west, or any other train, drawn by its own locomotive engine No. 3639, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said second cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

III.

That answering the third cause of action therein, it denies that beginning at the hour of 5:00 P. M., on October 3d, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its conductor, G. D. Brown, to be or remain on duty as such, or at all, for a longer period than 16 consecutive hours.

Denies that said conductor, G. D. Brown, was required or permitted to be or remain on duty as set out in said third cause of action, or was engaged in or connected with the movement of defendant's [60] train No. 1, or any other train, drawn by its own locomotive engine No. 3434, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said third cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

IV.

That answering the fourth cause of action therein, it denies that beginning at the hour of 5:00 o'clock P. M., on October 3d, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its brakeman, R. A. Edwards, to be or remain on duty as such, or at all, for a longer period than 16 consecutive hours.

Denies that said brakeman, R. A. Edwards, was required or permitted to be or remain on duty as set out in said fourth cause of action, or was engaged in or connected with the movement of defendant's train No. 1, or any other train, drawn by its own locomotive engine No. 3434, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said fourth cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

V.

That answering the fifth cause of action therein, it denies that beginning at the hour of 5:00 o'clock P. M., on October 3d, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its brakeman, H. E. Berringer, to be or remain on duty as such, or at all, for a longer period than 16 consecutive hours.

Denies that said brakeman, H. E. Berringer, was required or [61] permitted to be or remain on duty as set out in said fifth cause of action, or was engaged in or connected with the movement of defendant's train No. 1, or any other train, drawn by its own locomotive engine No. 3434, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said fifth cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

VI.

That answering the sixth cause of action therein, it denies that beginning at the hour of 5:30 o'clock A. M., on October 4th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its conductor, J. P. Fitzpatrick, to be or remain on duty as such, or at all, for a longer period than 16 consecutive hours.

Denies that said conductor, J. P. Fitzpatrick, was required or permitted to be or remain on duty as set out in said sixth cause of action, or was engaged in or connected with the movement of defendant's train No. 7, or any other train, drawn by its own locomotive engine No. 3433, the said train being then and there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said sixth cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

VII.

That answering the 7th cause of action herein, it denies that beginning with the hour of 5:30 o'clock A. M., on October 4th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its brakeman, J. S. Roberts, to be or remain on duty, as such [62] or at all, for a longer period than 16 consecutive hours.

Denies that said brakeman, J. S. Roberts, was required or permitted to be or remain on duty as set

out in said 7th cause of action, or was engaged in or connected with the movement of defendant's train No. 7, or any other train, drawn by its own locomotive engine No. 3433, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 7th cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

VIII.

That answering the 8th cause of action therein, it denies that beginning at the hour of 5:50 o'clock A. M., on October 4th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its brakeman, C. A. Carter, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said brakeman, C. A. Carter, was required or permitted to remain or be on duty as set out in said 8th cause of action, or was engaged in or connected with the movement of defendant's train No. 7, or any other train, drawn by its own locomotive engine No. 3433, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 8th cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

IX.

That answering the 9th cause of action therein, it denies that beginning at the hour of 2:30 P. M., on October 7th, 1912, upon its line of railroad, at or be-

tween the stations of San Bernardino, California, and Pomona, California, and within the jurisdiction [63] of this court, or at any other place, it required or permitted its engineer, Charles W. Madden, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said Madden was so on duty from said hour of 2:30 o'clock P. M., on October 7th, 1912, until the hour of 2:40 o'clock P. M., on October 8th, 1912, or longer than until the hour of 6:15 o'clock A. M., on said October 8th, 1912.

Denies that said engineer, Charles W. Madden, was required or permitted to be or remain on duty as set out in said 9th cause of action, or was engaged in or connected with the movement of defendant's train extra west, or any other train, drawn by its own locomotive engine No. 3617, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 9th cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

X.

That answering the tenth cause of action therein, it denies that beginning at the hour of 2:30 o'clock P. M., on October 7th, 1912, upon its line of railroad, at or between the stations of San Bernardino, California, and Pomona, California, and within the jurisdiction of this court, or at any other place, it required or permitted its fireman, Joe Glynn, to be or remain on duty, as such or at all, for a period longer than 16 consecutive hours.

Denies that said Glynn was so on duty from said hour of 2:30 o'clock P. M., on October 7th, 1912, until the hour of 2:40 o'clock P. M., on October 8th, 1912, or longer than until the hour of 6:15 A. M., on said October 8th, 1912.

Denies that said fireman, Joe Glynn, was required or permitted to be or remain on duty as set out in said tenth cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive [64] engine No. 3617, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said tenth cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

XI.

That answering the 11th cause of action therein, it denies that beginning at the hour of 5:00 o'clock P. M. on October 8th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Scott, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, H. P. Mitchell, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that the said Mitchell was so on duty from said hour of 5:00 o'clock P. M. on October 8th, 1912, until the hour of 10:30 o'clock A. M. on October 9th, 1912, or longer than until the hour of 8:55 o'clock A. M. on said October 9th, 1912.

Denies that said engineer, H. P. Mitchell, was required or permitted to be or remain on duty as set

out in said 11th cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3669, the said train being then and there engaged in the movement of the interstate traffic.

Denies that by reason of any facts alleged in said 11th cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

XII.

That answering the 12th cause of action therein, it denies that beginning at the hour of 5:00 o'clock P. M. on October 8th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Scott, California, and within the jurisdiction of this court, or at any other place, it required or permitted its [65] fireman, C. E. Caskey, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said Caskey was so on duty from said hour of 5:00 o'clock P. M. on October 8th, 1912, until the hour of 10:30 o'clock A. M. on October 9th, 1912, or longer than until the hour of 8:55 o'clock A. M. on said October 9th, 1912.

Denies that said fireman, C. E. Caskey, was required or permitted to be or remain on duty as set out in said 12th cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3669, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said

12th cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

XIII.

That answering the 13th cause of action therein, it denies that beginning at the hour of 8:45 o'clock P. M. on October 13th, 1912, upon its line of railroad, at or between the stations of Otis, California, and San Bernardino, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, O. A. Weeks, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said Weeks was so on duty from said hour of 8:45 o'clock P. M. on October 13th, 1912, until the hour of 3:55 o'clock P. M. on October 14th, 1912, or longer than until the hour of 12:35 o'clock P. M., on said October 14th, 1912.

Denies that said engineer, O. A. Weeks, was required or permitted to be or remain on duty as set out in said 13th cause of action, or was engaged in or connected with the movement of defendant's train 81 and extra west, or any other train, drawn by its own locomotive engine No. 3666, the said train being then or [66] there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 13th cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

XIV.

That answering the 14th cause of action therein, it denies that beginning at the hour of 8:45 o'clock P. M. on October 13th, 1912, upon its line of railroad, at

or between the stations of Otis, California, and San Bernardino, California, and within the jurisdiction of this court, or at any other place, it required or permitted its fireman, Jesse All, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said All was so on duty from said hour of 8:45 o'clock P. M. on October 13th, 1912, until the hour of 3:55 o'clock P. M. on October 14th, 1912, or longer than until the hour of 12:35 o'clock P. M. on said October 14th, 1912.

Denies that said fireman, Jesse All, was required or permitted to be or remain on duty as set out in said 14th cause of action, or was engaged in or connected with the movement of defendant's train 81 and extra west, or any other train, drawn by its own locomotive engine No. 3666, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 14th cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

XV.

That answering the 15th cause of action therein, it denies that beginning at the hour of 4:15 o'clock P. M. on October 16th, 1912, upon its line of railroad, at or between the stations of San Bernardino, California, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, J. G. Allison, to be or remain on duty, as [67] such, or at all, for a longer period than 16 consecutive hours.

Denies that said Allison was so on duty from said

hour of 4:15 o'clock P. M. on October 16th, 1912, until the hour of 9:45 o'clock A. M. on October 17th, 1912, or longer than until the hour of 8:15 o'clock A. M. on said October 17th, 1912.

Denies that said J. G. Allison was required or permitted to be or remain on duty as set out in said fifteenth cause of action, or was engaged in or connected with the movement of defendant's train extra west, or any other train, drawn by its own locomotive engine No. 3629, the said train being then and there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 15th cause of action, the defendant is liable to the plaintiff in the sum of $500.00 or any other sum.

XVI.

That answering the 16th cause of action therein, it denies that beginning at the hour of 4:15 o'clock P. M. on October 16th, 1912, upon its line of railroad, at or between the stations of San Bernardino, California, and Los Angeles, California, and within the jurisdiction of this court, or any other place, it required or permitted its fireman, F. Thompson, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said Thompson was so on duty from said hour of 4:15 o'clock P. M. on October 16th, 1912, until the hour of 9:45 o'clock A. M. on October 17th, 1912, or longer than until the hour of 8:15 o'clock A. M. on said October 17th, 1912.

Denies that said fireman, F. Thompson, was required or permitted to be or remain on duty as set out in said 16th cause of action, or was engaged in

or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3629, the said train being then or there engaged in the movement of interstate traffic. [68]

Denies that by reason of any facts alleged in said 16th cause of action, the defendant is liable to the plaintiff in the sum of *$50.00* or any other sum.

XVII.

That answering the 17th cause of action therein, it denies that beginning at the hour of 6:15 o'clock P. M. on October 18th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Otis, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, Joel V. Noblitt, to be or remain on duty, as such, or at all, for a longer period than sixteen consecutive hours.

Denies that said Noblitt was so on duty from said hour of 6:15 o'clock P. M. on October 18th, 1912, until the hour of 11:40 o'clock A. M. on October 19th, 1912, or longer than until the hour of 10:10 o'clock A. M. on said October 19th, 1912.

Denies that said engineer, Joel V. Noblitt, was required or permitted to be or remain on duty as set out in said 17th cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3666, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said

17th cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

XVIII.

Answering the 18th cause of action in said complaint, it denies that beginning at the hour of 6:15 o'clock P. M. on October 18th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Otis, California, and within the jurisdiction of this court, or at any other place, it required or permitted its fireman, H. O. Johnson, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours. [69]

Denies that the said Johnson was so on duty from said hour of 6:15 o'clock P. M. on October 18th, 1912, until the hour of 11:40 o'clock A. M. on October 19th, 1912, or longer than until the hour of 10:10 o'clock A. M., on said October 19th, 1912.

Denies that said fireman, H. O. Johnson, was required or permitted to be or remain on duty as set out in said 18th cause of action, or was engaged in or connected with the movement of the defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3666, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 18th cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

XIX.

Answering the 19th cause of action of said complaint, it denies that beginning at the hour of 5:00 o'clock A. M. on October 27th, 1912, upon its line of

railroad, at or between the stations of Las Vegas, Nevada, and Otis, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, J. C. Frazier, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that the said Frazier was so on duty from said hour of 5:00 o'clock A. M. on October 27th, 1912, until the hour of 11:00 o'clock P. M. of said date, or longer than until the hour of 8:55 o'clock P. M. on said October 27th, 1912.

Denies that said engineer, J. C. Frazier, was required or permitted to be or remain on duty as set out in said 19th cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3668, the said train being then and there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 19th cause [70] of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

XX.

Answering the 20th cause of action of said complaint, it denies that beginning at the hour of 5:00 o'clock A. M. on October 27th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Otis, California, and within the jurisdiction of this court, or at any other place, it required or permitted its fireman, L. Cruncleston, to be or remain on duty as such or at all, for a longer period

than 16 consecutive hours.

Denies that said Cruncleston was so on duty from said hour of 5:00 o'clock A. M. on October 27th, 1912, until the hour of 11:00 o'clock P. M. of said date, or longer than until the hour of 8:55 o'clock P. M. on said October 27th, 1912.

Denies that said fireman, L. Cruncleston, was required or permitted to be or remain on duty as set out in said 20th cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3668, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 20th cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

XXI.

Answering the 21st cause of action of said complaint, it denies that beginning at the hour of 3:40 o'clock P. M. on October 31st, 1912, upon its line of railroad, at or between the stations of San Bernardino, California, and Ontario, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, Charles W. Madden, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours. [71]

Denies that the said Madden was so on duty from said hour of 3:40 o'clock P. M. on October 31st, 1912, until the hour of 10:00 o'clock A. M. on November

1st, 1912, or longer than until the hour of 7:40 o'clock A. M. on said November 1st, 1912.

Denies that said engineer, Charles W. Madden, was required or permitted to be or remain on duty as set out in said 21st cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3627, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 21st cause of action, the defendant is liable to the plaintiff in the sum of $500.00 or any other sum.

XXII.

That answering the 22d cause of action of said complaint, it denies that beginning at the hour of 3:40 o'clock P. M. on October 31st, 1912, upon its line of railroad, at or between the stations of San Bernardino, California, and Ontario, California, and within the jurisdiction of this court, or any other place, it required or permitted its fireman, Joe Glynn, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said Glynn was so on duty from said hour of 3:40 o'clock P. M. on October 31st, 1912, until the hour of 10:00 o'clock A. M. on November 1st, 1912, or longer than until the hour of 7:40 o'clock A. M. on said November 1st, 1912.

Denies that said fireman, Joe Glynn, was required or permitted to be or remain on duty as set out in said 22d cause of action, or was engaged in or connected with the movement of defendant's train,

extra west, or any other train, drawn by its own locomotive engine No. 3627, the said train being then or there engaged in the movement of interstate traffic. [72]

Denies that by reason of any facts alleged in said 22d cause of action, the defendant is liable to the plaintiff in the sum of $500.00, or any other sum.

WHEREFORE, the defendant having answered fully, demands judgment that the plaintiff take nothing by its said action, or causes of action, and that defendant recover its costs herein.

PENNEL CHERRINGTON,
Attorney for Defendant.

State of California,
County of Los Angeles,—ss.

W. H. Comstock, being first duly sworn, deposes and says that he is an officer of said defendant corporation, to wit, the Secretary thereof; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated upon his information and belief, and as to those matters he believes it to be true.

W. H. COMSTOCK.

Subscribed and sworn to before me, this 14th day of April, 1913.

[Seal] FRANCIS J. MIEDING.
Notary Public.

Service of the foregoing answer is hereby ad-

mitted, and a copy thereof received, this 14th day of April, 1913.

HARRY R. ARCHBALD,
M. E. Y.,
Attorneys for Plaintiff.

[Endorsed]: No. 243 Civil. U. S. District Court, Ninth District, Southern District of California. The United States of America, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Answer. Filed Apr. 14, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502–4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [73]

[Order Consolidating Cases Nos. 106 and 243.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the 6th day of October, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 243—Civil S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Defendant.

Harry R. Archbald, Esq., Assistant U. S. Attorney, and Monroe C. List, Esq., Special Assistant U. S. Attorney, appearing as counsel for the United States; Pennel Cherrington, Esq., and F. R. McNamee, Esq., appearing as counsel for defendant; now, after the commencement of the trial in case No. 106 Civil, Southern Division, between the same parties, it is, on motion of Monroe C. List, Esq., Special Assistant U. S. Attorney, and with the consent of Pennel Cherrington, Esq., of counsel for defendant, ordered that this cause be, and the same hereby is consolidated with said cause No. 106 Civil S. D., and it is further ordered that the trial of said cause as consolidated proceed.

[Endorsed]: No. 243 Civil. United States District Court, Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. San Pedro, Los Angeles & Salt Lake Railroad Company, Defendant. Copy Minute Order. Filed October 10, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [74]

[Verdict.]

In the District Court of the United States for Southern District of California, Southern Division.

Nos. 106 and 243—Civil, Consolidated.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Defendant.

We, the jury in the above-entitled cause, under the instructions of the Court, find for the plaintiff in the 1st, 2d, and 3d causes of action alleged in Complaint in case No. 106 Civil, and each and every of the twenty-two causes of action alleged in Complaint in case No. 243 Civil, and for the defendant in the 4th cause of action alleged in Complaint in case No. 106 Civil.

Los Angeles, Cal., October 8th, 1913.

ISAAC B. NEWTON,
Foreman.

[Endorsed]: 106-243 Civil, Consolidated. U. S. District Court, Southern Dist. of Calif., Southern Division. United States vs. San Pedro, Los Angeles & Salt Lake Railroad Co. Verdict. Filed October 8, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [75]

[Judgment.]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

Nos. 106 and 243—Civil, Consolidated.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Defendant.

This cause having come on regularly for trial on the 6th day of October, 1913, being a day in the July Term, A. D. 1913, of the District Court of the United States for the Southern District of California, Southern Division, before the court and a jury of twelve (12) men duly impanelled; Harry R. Archbald, Esq., Assistant U. S. Attorney, and Monroe C. List, Esq., Special Assistant U. S. Attorney, appearing as counsel for the plaintiffs, and Pennel Cherrington, Esq., appearing as counsel for the defendant; and the fifth cause of action in case No. 106 Civil, having been, on said 6th day of October, dismissed; and the trial having been proceeded with on the 6th, 7th and 8th days of October, 1903, and witnesses having been sworn and examined, and documentary evidence having been introduced, and the evidence having been closed, and the cause after argument by counsel for the respective parties, and the instructions of the Court, having, on the said 8th day of October, 1913, been submitted to the jury, and the jury on the 8th day of October, 1913, having rendered the following verdict:

"In the District Court of the United States for Southern District of California, Southern Division.

Nos. 106 and 243, Civil, Consolidated.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Defendant. [76]

We, the jury in the above-entitled cause, under the instructions of the Court, find for the plaintiff in the 1st, 2d and 3d causes of action alleged in Complaint in case No. 106 Civil, and each and every of the twenty-two causes of action alleged in Complaint in case No. 243 Civil, and for the defendant in the 4th cause of action alleged in Complaint in case No. 106 Civil.

Los Angeles, Cal., October 8th, 1913.

ISAAC B. NEWTON.
Foreman."

—and the Court having pronounced judgment as follows, to wit: That the defendant pay a penalty of one hundred (100) dollars on each of the following causes of action in case No. 243 Civil, S. D., to wit: Causes of action numbers 1, 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22; that the defendant pay a penalty of one hundred and fifty (150) dollars on each of the following causes of action in case No. 243 Civil S. D., to wit: Causes of action

numbers 3, 4, 5, 6, 7, and 8; that the defendant pay a penalty of one hundred and fifty (150) dollars on each of the following causes of action in case No. 106 Civil S. D., to wit: Causes of action numbers 1, 2 and 3; and that defendant pay the costs in case No. 106 Civil, S. D., in case No. 243 Civil, S. D., and in the consolidated case Nos. 106 and 243 Civil, S. D.—

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the United States of America, plaintiffs herein, have and recover of and from the San Pedro, Los Angeles & Salt Lake Railroad Company, defendant herein, the sum of Two Thousand Nine Hundred and Fifty Dollars ($2,950.00), together with said plaintiffs' costs and disbursements in this behalf taxed at $71.20.

Judgment entered October 10th, 1913.

WM. M. VAN DYKE,
Clerk.
By C. E. Scott,
Deputy Clerk. [77]

[Endorsed]: No. 106 and 243, Civil, Consolidated. United States District Court, Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. San Pedro, Los Angeles & Salt Lake Railroad Company, Defendant. Copy of Judgment. Filed October 10, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [78]

[Certificate to Judgment and Judgment-roll.]

In the District Court of the United States, for the Southern District of California, Southern Division.

Nos. 106 and 243—Civil, Consolidated.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled action, and recorded in Judgment Book 2 of said Court for the Southern Division, at page 227 thereof, and I further certify that the foregoing papers hereto annexed, constitute the Judgment-roll in said action.

ATTEST my hand and the seal of said District Court, this 10th day of October, A. D. 1913.

[Seal] WM. M. VAN DYKE,
Clerk.

By C. E. Scott,
Deputy Clerk.

[Endorsed]: No. 106-243 Civil, Consolidated. In the District Court of the United States for the Southern District of California, Southern Division. The United States of America, vs. San Pedro, Los

Angeles & Salt Lake Railroad Co. Judgment-roll. Filed October 10, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Recorded Judg. Register Book No. 2, page 227. [79]

[Order Denying Motion for New Trial.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-ninth day of December, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

Nos. 106 and 243—Civil, Consolidated.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY,

Defendant.

This cause coming on this day to be heard on defendant's motion for a new trial; Harry R. Archbald, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; Pennel Cherrington, Esq., appearing as counsel for defendant; and this cause having been submitted to the Court for its consideration and decision, without argument, on said motion, it is now ordered that defendant's mo-

tion for a new trial be, and the same hereby is denied. [80]

In the United States District Court in and for the Southern District of California, Southern Division.

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

v.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

Bill of Exceptions.

The above consolidated causes coming on regularly for trial, on October 6th, 1913, before the Honorable Olin Wellborn, Judge of the above-named court, and a jury duly empaneled and sworn, Messrs. Albert Schoonover, Harry R. Archbald and Monroe C. List, appearing for plaintiff, and Pennel Cherrington appearing for defendant, the following proceedings were had and testimony taken:

Stipulation [of Facts].

The following stipulation of facts was then read in evidence, (omitting title of court and causes):

Now come the plaintiff and defendant in the above-numbered and styled cause, by their respective attorneys, and in order to facilitate the trial of the same, enter into the following agreement:

The defendant may be permitted to make any affirmative defense under the plea filed by it in this cause, without the necessity of filing an amended answer. [81]

The following facts, which are agreed to be true in all particulars, may be admitted and read as evidence at the trial thereof:

1. The defendant is a corporation organized and doing business under the laws of the State of Utah and having an office and place of business at Los Angeles, Cal. It is, and was during the times mentioned in plaintiff's petition, a common carrier engaged in interstate commerce by railroad in the State of California,

Counts 1–2.

2. The defendant, on October 1 and 2, 1912, operated on its line of railroad from its station at Los Angeles, Cal., to Crestmore, Cal., and return, its certain freight train, known as Extra East and West, drawn by defendant's locomotive engine No. 3639, being the train mentioned in the 1st and 2d counts of plaintiff's petition, said train being at all times engaged in the movement of interstate traffic.

3. The defendant required and permitted its certain employees, to wit, locomotive engineer C. A. Cochrane and locomotive fireman A. B. Kleir, being the employees mentioned in the 1st and 2d counts, respectively, of said petition, to be and remain on duty as such and engaged in and connected with the movement of said train as follows:

4. Said train was scheduled to leave Los Angeles at 1:00 P. M., October 1, 1912. In compliance with defendant's rules and regulations, said employees reported for and went on duty at 12:30 P. M. on said date, at which time they began the work of looking after their engine and putting it in proper condition for road service, which character of service they performed until 1:34 P. M. on said date, at which time said train left Los Angeles.

5. For the purposes of this stipulation, the character of service above described will hereafter be designated as preparatory service.

6. From 1:34 P. M., on said date, until 4:30, the following morning, said employees were engaged in the work of operating said [82] engine in the movement of said train from Los Angeles to Crestmore, and thence back to Rowlands, Cal., at which last named place and time said train was tied up by defendant on account of the Federal 16 hour law, and the crew, with the exception of said engineer and fireman, relieved from duty and from all responsibility as to said train.

7. For the purpose of this stipulation, the character of service last described will hereafter be designed as road service.

8. From Rowlands said train, including engine 3639, was hauled to Los Angeles by another of defendant's engines, arriving there at 10:40 A. M., October 2, 1912, at which time and place said engineer and fireman were released from all service of whatsoever nature and from all responsibility for the performance of any kind of service.

9. Between Rowlands and Los Angeles said employees were not required to nor did they operate said engine for the purpose of hauling said train between those stations; nor were they charged with the present responsibility for the operation of said engine for the purpose of hauling said train should the occasion arise. They did not handle train orders during this period. Said employees, however, were required to remain on duty on their engine while it was being hauled in said train from Rowlands to Los Angeles, for the purpose of watching same, seeing that the fire was kept up, that the water did not get too low in the boiler, and that a certain amount of steam pressure was always maintained.

10. For the purposes of this stipulation, the character of service last described will hereafter be designated as watchman's service.

11. The continuous service, therefore, required of said employees in connection with said train on the above dates was 22 hours and 10 minutes, being divided or classified as follows: [83] 1 hour and 4 minutes preparatory service, 14 hours and 56 minutes road service, and 6 hours and 10 minutes watchmen's service.

Counts 9–10.

12. The defendant, on October 7 and 8, 1912, operated on its line of railroad from its station at San Bernardino, Cal., to Los Angeles, its certain freight train, known as extra west, drawn by defendant's locomotive engine No. 3617, being the train mentioned in the 9th and 10th counts of said petition, said train being at all times engaged in the movement of interstate traffic.

13. The defendant required and permitted its certain employees, to wit, locomotive engineer Chas. W. Madden and locomotive fireman Joe Glynn, being the employees mentioned in the 9th and 10th counts respectively, of said petition, to be and remain on duty from 2:30 P. M., October 7th, 1912, to 2:40 P. M., October 8, 1912, which period of 24 hours and 10 minutes of continuous service was in connection with said train, and was divided or classified as follows:

40 minutes preparatory service at San Bernardino.

15 hours and 20 minutes road service between San Bernardino and Pomona, Cal., where said train was tied up by defendant on account of the Federal 16 hour law, and

8 hours and 10 minutes service as watchman on said engine while said train was being hauled from Pomona to Los Angeles by another of defendant's engines.

Counts 11–12.

14. The defendant, on October 8 and 9, 1912, operated on its line of railroad from its station at Las Vegas, Nev., to Scott, Cal., its certain freight train,

known as extra west, drawn by defendant's locomotive engine No. 3617, being the train mentioned in the 11th and 12th counts of said petition, said train being at all times engaged in the movement of interstate traffic.

15. The defendant required and permitted its certain employees, to wit, locomotive engineer H. P. Mitchell and locomotive fireman, C. E. Caskey, being the employees mentioned in the 11th and [84] 12th counts, respectively, of said petition, to be and remain on duty from 5:00 P. M., October 8, 1912, to 10:30 A. M., October 9, 1912, which period of 17 hours and 30 minutes of continuous service was in connection with said train, and was divided or classified as follows:

40 minutes preparatory service at Las Vegas.

15 hours and 15 minutes road service between Las Vegas and Scott, where said train was tied up by defendant on account of the Federal 16 hour law, and

1 hour and 35 minutes service as watchman on said engine while waiting at Scott for relief crew.

Counts 13–14.

16. The defendant, on October 13 and 14, 1912, operated on its line of railroad from its station at Otis, Cal., to San Bernardino, its certain freight train, known as No. 81 and extra west, drawn by defendant's locomotive engine No. 3666, being the train mentioned in the 13th and 14th counts of said petition, said train being at all times engaged in the movement of interstate traffic.

17. The defendant required and permitted its

certain employees, to wit, Locomotive engineer O. A. Weeks and locomotive fireman Jess All, being the employees mentioned in the 13th and 14th counts, respectively, of said petition, to be and remain on duty from 8:45 P. M., October 13, 1912, to 3:55 P. M., October 14, 1912, which period of 19 hours and 10 minutes of continuous service was in connection with said train, and was divided or classified as follows:

6 hours and 50 minutes preparatory service, including delays at Otis to change engines, make repairs to same, and make up train;

8 hours and 55 minutes road service between Otis and Summitt, Cal., where said train was tied up by defendant on account of the Federal 16 hour law, and,

3 hours and 25 minutes service as watchman on said engine while [85] said train was being hauled to San Bernardino by another of defendant's engines.

Counts 15–16.

18. The defendant, on October 16 and 17, 1912, operated on its line of railroad from its station at San Bernardino to Pomona, its certain freight train, known as extra west, drawn by defendant's locomotive engine No. 3629, being the train mentioned in the 15th and 16th counts of said petition, said train being at all times engaged in the movement of interstate traffic.

19. The defendant required and permitted its certain employees, to wit, locomotive engineer J. G. Allison and locomotive fireman F. Thompson, being the employees mentioned in the 15th and 16th

counts, respectively of said petition, to be and remain on duty from 4:15 P. M., October 16, 1912, to 9:45 A. M. October 17, 1912, which period of 17 hours and 30 minutes of continuous service was in connection with said train, and was divided or classified as follows:

1 hour preparatory service at San Bernardino,

15 hours' road service between San Bernardino and Pomona, where said train was tied up by defendant on account of the Federal 16 hour law, and

1 hour and 30 minutes service as watchman on said engine while waiting at Pomona for relief crew.

Counts 17–18.

20. The defendant, on October 18 and 19, 1912, operated on its line of railroad from its station at Las Vegas to Otis, its certain freight train, known as extra west, drawn by defendant's locomotive engine No. 3666, being the train mentioned in the 17th and 18th counts of said petition, said train being at all times engaged in the movement of interstate traffic.

21. The defendant required and permitted its certain employees, to wit, locomotive engineer Joel V. Noblitt, and locomotive fireman H. O. Johnson, being the employees mentioned in the 17th and 18th counts, respectively, of said petition, to be and remain on [86] duty from 6:15 P. M., October 18, 1912, to 11:40 A. M., October 19, 1912, which period of 17 hours and 25 minutes of continuous service was in connection with said train, and was divided or classified as follows:

40 minutes preparatory service at Las Vegas,

15 hours and 15 minutes road service between Las Vegas and Harvard, Cal., where said train was tied up by defendant on account of the Federal 16 hour law, and

1 hour and 30 minutes service as watchman on said engine while said train was being hauled from Harvard to Otis by another of defendant's engines.

Counts 19–20.

22. The defendant, on October 27, 1912, operated on its line of railroad from its station at Las Vegas to Otis, its certain freight train, known as extra west, drawn by defendant's locomotive engine No. 3668, being the train mentioned in the 19th and 20th counts of said petition, said train being at all times engaged in the movement of interstate traffic.

23. The defendant required and permitted its certain employees, to wit, locomotive engineer J. C. Frazier and locomotive fireman L. Cruncleston, being the employees mentioned in the 19th and 20th counts, respectively of said petition, to be and remain on duty from 5:00 A. M., October 27, 1912, to 11:00 P. M., on said date, which period of 18 hours of continuous service was in connection with said train, and was divided or classified as follows:

1 hour and 15 minutes preparatory service at Las Vegas,

14 hours and 40 minutes road service between Las Vegas and Harvard, where said train was tied up by defendant on account of the Federal 16 hour law, and

2 hours and 5 minutes service as watchman on said engine while said train was being hauled from Harvard to Otis by another of defendant's engines.

Counts 21–22.

24. The defendant, on October 31, 1912, and November 1, 1912, [87] operated on its line of railroad from its station at San Bernardino, to Ontario, Cal., its certain freight train, known as extra west, drawn by defendant's locomotive engine No. 3627, being the train mentioned in the 21st and 22d counts of said petition, said train being at all times engaged in the movement of interstate traffic.

25. The defendant required and permitted its certain employees, to wit, locomotive engineer Chas. W. Madden and locomotive fireman Joe Glynn, being the employees mentioned in the 21st and 22d counts, respectively, of said petition, to be and remain on duty from 3:40 P. M., October 31, 1912, to 10:00 A. M., November 1, 1912, which period of 18 hours and 20 minutes of continuous service was in connection with said train, and was divided or classified as follows:

30 minutes preparatory service at San Bernardino,

15 hours and 30 minutes road service between San Bernardino and Ontario, where said train was tied up on account of the Federal 16-hour law, and,

2 hours and 20 minutes service as watchman on said engine while waiting at Ontario for relief crew. [88]

[Testimony of Carl P. Smith, for Plaintiff.]

CARL P. SMITH, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

I am Chief Clerk of the Superintendent of the defendant railroad company. It is in my office that the records of the movement of trains are kept.

Train No. 1 referred to in the 3d, 4th, and 5th causes of action, in case No. 243, left Las Vegas, Nevada, on October 3d, 1912. It came from Salt Lake City, but on this Division it started at Las Vegas with its crew. The destination of the train was Los Angeles; it was a passenger train, and its conductor was G. D. Brown and the brakemen were R. A. Edwards and H. E. Henderson. On the 3d of October, 1912, they reported for duty at 5:00 P. M., the train leaving at 5:42 P. M. In the meantime they were engaged in preparatory work, going over their train, making inspection of the equipment, etc. These employees brought the train through to Los Angeles, and during all of the trip were connected with its movement. They reached Los Angeles at 8:00 P. M. October 4th, at which time they were released, having been in continuous service 27 hours. The train was not operated over our railroad the entire distance; under normal conditions the train would have gone from Las Vegas to Daggett over the Salt Lake road (the Sale Lake road, wherever mentioned, refers to the defendant), from Daggett to Colton over the line of the Santa F[illegible], from Colton to Riverside Junction over the Southern Pacific, and from there in over the Salt Lake road. We have a

(Testimony of Carl P. Smith.)

joint track contract with both the Santa Fe and Southern Pacific. The train in question came over our tracks from Las Vegas to Crucero, California. On account of land slides, this train was detoured to Ludlow over the Tonopah & Tidewater, and thence over the Santa Fe to Daggett, and from Daggett over the usual route. Las Vegas is 334 miles from Los Angeles. From Las Vegas to Crucero it is 129.9 miles; from Crucero to [89] Daggett it is 41.1 miles, and from Daggett to Los Angeles it is 158.6 miles. In detouring that day the train went approximately 28 extra miles; it is a little over 25 miles from Crucero to Ludlow, and 44.2 miles from Ludlow to Daggett. The train ran on its schedule from Las Vegas to Crucero, but from there on to Daggett probably as an extra, as it was not regularly scheduled over the Tonopah & Tidewater or the Santa Fe lines between the points mentioned. From Daggett on to Los Angeles, it was No. 1. The employees mentioned were in continuous service from the time they left Las Vegas until they arrived at Los Angeles. They were under our control from Las Vegas to Crucero, and then again after they left Riverside Junction.

The first division point west of Las Vegas is Otis, about 4 miles east of Daggett. That is a freight terminal and not a passenger terminal, though the freight crews at Otis were qualified as passenger crews. The train was delayed ten minutes at Daggett while a fresh engine crew was sent down from Otis to relieve the engineer and fireman, but there was

(Testimony of Carl P. Smith.)

no conductor or brakeman sent. There was no effort made to send down a conductor or brakeman from Otis. We had no crews available at Otis, that is, freight crews, when the train passed Daggett. There was no effort made at San Bernardino to release the conductor and brakemen. San Bernardino, for overland passenger trains, is not a terminal, though it is a freight terminal. It is also a passenger terminal for local passenger crews running between San Bernardino and Los Angeles. Those trains go to San Bernardino over the line of the Southern Pacific after leaving Riverside Junction. There was no effort made at San Bernardino to release the crew of No. 1, though it could have been done by sending a crew from Los Angeles. The crew could have been relieved at any point by sending out a crew from Los Angeles, provided we had means to get them there.

This train reached Crucero at 11:55 P. M. on October 3d; and [90] Ludlow at 6:15 A. M. October 4th, left Ludlow at 9:45 A. M. reached Daggett at 11:45 A. M. October 4th, leaving there at 11:55 A. M., and reached San Bernardino at 4:35 P. M. on October 4th.

Crucero, Ludlow and Dagggett were telegraph stations, handled train orders, and were open when this train passed those points. This train was under the direction of the Chief Dispatcher at Los Angeles, but he would not know when the train arrived at or departed from Ludlow because of trouble with the telegraph wires as a result of weather conditions. He knew, however, when the train reached Daggett, and

(Testimony of Carl P. Smith.)
when it reached Daggett, he knew that it would be impossible to get to Los Angeles within the sixteen-hour period from the time it left Las Vegas. But notwithstanding that there was no effort made to send a crew from Otis to relieve it at San Bernardino, or to send a relief crew from Los Angeles.

Train No. 7, referred to in the 6th, 7th and 8th causes of action in case No. 243, was a limited passenger train, which left Las Vegas, Nevada, at 6:12 A. M., on October 4th. J. P. Fitzpatrick was the conductor, and J. S. Roberts and C. A. Carter were the brakemen. They went on duty at 5:30 A. M. October 4th, and from then until 6:12 they were engaged in preparatory work, as in the case of the crew of the other train. They brought the train into Los Angeles from Las Vegas, reaching Los Angeles at 6:28 A. M., October 5th, 1912, when they were relieved, having been in continuous service 24 hours and 55 minutes, during all of which time they were connected with the movement of the train. This train made the same detour as did train No. 1. It reached Daggett at 2:50 P. M. Oct. 4th. It left there at 3:35 P. M., and reached San Bernardino at 3:34 A. M., October 5th, after the 16-hour period had already expired.

I can't state what telegraph offices were open between Daggett and San Bernardino when that train passed, because though [91] they are joint offices, I have not their records and don't know their hours of service. There was no effort made to relieve the crew of this train at San Bernardino, though it could

(Testimony of Carl P. Smith.)

have been done by sending a crew from Los Angeles. Had there been freight crews available, the passenger crew could have been relieved with them as they were qualified for passenger service. Neither in the case of train No. 1, on October 3d and 4th, nor train No. 7, on October 4th and 5th, was any effort made to send relief crews from Los Angeles. The scheduled running time of No. 1 for October 3d and 4th, between Las Vegas and Los Angeles, was 13 hours and 30 minutes, and for No. 7, it was 11 hours and 28 minutes.

I am familiar with the stipulation concerning counts 1 and 2 and counts 9 to 22, inclusive. The purpose of keeping up a certain amount of steam on these engines was for convenience in lubricating.

When No. 1 left Las Vegas on the night of October 3d, it was not known that it would have to detour at Crucero. The train was delayed 1 hour and 30 minutes between Las Vegas and Crucero, by having to stop to pick up section and bridge men to repair the land slide which occurred between Crucero and Otis—to help clear the line for traffic. When the train left Las Vegas it was not known that it would have to pick up these men; it was not known until the train reached Jean, about 40 miles from Las Vegas. The land slide was on the main line between Crucero and Otis. Otis was a freight terminal; that is, a point at which freight train crews are relieved. There is a difference between a passenger train crew terminal and an engine crew terminal. A passenger train crew consists of a conductor and two brakemen,

(Testimony of Carl P. Smith.)
and an engine crew consists of an engineer and a fireman. Otis was not a terminal for passenger train crews, but was a terminal for passenger engine crews. San Bernardino was not a passenger train crew terminal for through service. [92]

When No. 1 got to Daggett, where it changed its engine crew instead of at Otis, as was usual, there were no freight crews available at Otis. They had been put in work train service and had gone to the land slide to help clear the line. When these two trains got to San Bernardino, there were no freight crews there; they had been sent out prior to the arrival of the train, in freight service. San Bernardino was not a passenger train crew terminal for through trains, but there were two local passenger train crews, which laid over there each night; they had only one brakeman each. The through trains ran from San Bernardino to Colton over the Santa Fe, but the two local crews ran from San Bernardino to Riverside Junction over the Southern Pacific, a different system of road and different road-bed from the Santa Fe. These local crews laying over at San Bernardino may have been familiar with the Santa Fe rules, but so far as I know, they never operated trains over the Santa Fe road.

Going back to train No. 1, leaving Las Vegas October 3d, this train was delayed at Crucero 55 minutes waiting for orders and the completion of arrangements to detour over the Tonopah & Tidewater road. This delay was not known when the train left Las Vegas. It was next delayed 2 hours and 10 minutes

(Testimony of Carl P. Smith.)

at Crucero by reason of finding a bridge washed out on the line of the Tonopah & Tidewater and having to return to Crucero until repairs could be made. This washout was not known of when the train left Las Vegas, nor when it left Crucero. This delay was 2 hours and 10 minutes. The train was delayed 1 hour and 35 minutes between Crucero and Ludlow on account of slow orders, due to light rails with which the Tonopah & Tidewater line was laid, and soft track as the result of rains. When that train left Las Vegas, we knew that that line was laid with light rail, but knew nothing of the other causes. We were always held down to about 15 miles an hour when detouring on the Tonopah & Tidewater, and we knew that when the train left Las [93] Vegas; that was the regular thing on account of the weight of our engines. When the train left Las Vegas we didn't know we had to detour; we did know, however, when No. 7 left Las Vegas, that it would have to detour. Before this we had frequently detoured passenger trains by way of Crucero and Ludlow. Ordinarily trains so detoured get to Los Angeles within the 16-hour period, barring unusual conditions, such as obtained in these cases.

Q. Now, then, going back, after Number 1 left Crucero, how much delay did you say there was between there and Ludlow?

A. 1 hour and 35 minutes.

Q. Now, did that include the fifteen-hour running time and shorter running time in some places because of weakened track?

(Testimony of Carl P. Smith.)

A. No, when I spoke of slow orders, I meant at points at which they held the train down in some places as low as 4 miles an hour by reason of the conditions which obtained.

That road (the Tonopah and Tidewater) had heavy rains the same as occurred on our line. We didn't know of or suspect these delays when the trains left Las Vegas. After the train left Las Vegas, heavy rains in the hills, severe electrical storms, and storm water running strongly in waterways, developed that were unknown of when the train left Las Vegas, and were unforeseen.

No. 1 was delayed at Ludlow 3 hours and 30 minutes, because the main line of the Santa Fe between Ludlow and Daggett was blocked by the derailment of a Santa Fe train, which necessitated that much delay. No. 1 got to Daggett at 11:45 A. M., about 17 hours and 5 minutes after leaving Las Vegas. It was already over the 16-hour period when it got to Daggett. I have no record of any delay between Daggett and Los Angeles.

No. 7 left Las Vegas on October 4th, at 6:12 A. M. and got to Daggett at 2:50 P. M., having detoured from Crucero. When it got to Daggett, it had been away from Las Vegas 8 hours and 38 minutes. The schedule running time of No. 7 from Daggett to Los Angeles is [94] 5 hours and 35 minutes, so that, had there been no delay encountered after No. 7 left Daggett, it would have gotten to Los Angeles within the 16-hour period. It was delayed, however, after leaving Daggett; it was delayed 24 minutes between

(Testimony of Carl P. Smith.)

Barstow and Victorville on account of a heavy windstorm which retarded it below the running time. It was further delayed at Hesperia 8 hours and 18 minutes by reason of the main line of the Santa Fe joint track being blocked at Lugo by the derailment of a Santa Fe freight train. This could not have been foreseen when the train left Las Vegas, neither could the delay because of the wind. None of the delays I have testified to could have been foreseen when either No. 1 or No. 7 left Las Vegas. The derailment at Lugo was caused by a freight train breaking a car in two when pulling into a siding, that blocked the main line. I cannot give the exact time of the derailment because I haven't the Santa Fe record, but I am correct about the 8 hour and 18 minutes delay. No. 7 was further delayed ten minutes at Lugo where the derailment occurred, by reason of the main line being blocked by the wrecking outfit having in tow these derailed cars so that the train had to run into the siding and back out in order to get by. That delay could not have been foreseen when the train left Las Vegas. This is the last delay of which I have any record. Had it not been for the delays I have testified to, the train running the regular schedule time would have gotten to Los Angeles within the 16-hour period after leaving Las Vegas. The wreck at Lugo was not known of when No. 7 left Daggett and could not have been foreseen.

Neither one of the local passenger crews at San Bernardino would have been sufficient to run a

(Testimony of Carl P. Smith.)

through train; it would have been necessary to take a portion of both crews, and this would have tied up one, or perhaps both, of these local passenger trains until relief crews could have been sent from Los Angeles. It would have taken one local crew and a half to man one through [95] train, which would have laid out both of the local trains, and these trains carried mail.

Referring to No. 1, of October 3d and 4th, before the train left Las Vegas, it was known that there had been heavy rains in the canyon between Otis and Crucero, but the extent of damage was not known. It was at Jean, I think, that the train got orders to pick up section men. This was about 40 miles from Las Vegas. It was known then that there was considerable damage in the canyon. There was 55 minutes delay at Crucero, and then we were delayed 2 hours and ten minutes on account of the washout when the train went back to Crucero. The regular running time of the train was 13 hours and 30 minutes, and there was preparatory service of 30 minutes required of the crew, so that under normal conditions they would have been on duty 14 hours. Then, before getting to Crucero, 1 hour and 30 minutes was lost by picking up section men. We were delayed at Crucero the first time 55 minutes, and the second time 2 hours and ten minutes. The train left Crucero at 12:50 A. M. When the train left Crucero it was known that we could not get the train in and get the men off duty within the 16 hours, and we then knew that the train, when it

(Testimony of Carl P. Smith.)

detoured down to Ludlow, would have to come back on our own line at Daggett a few miles down. Notwithstanding that, there was no effort made to relieve the crew either at Daggett or San Bernardino or by sending out a relief crew from Los Angeles. When train No. 7 of Oct. 4th reached San Bernardino, the same situation existed. It was known that we could not get it in within the 16 hours, and yet no more effort was made to relieve that crew than there had been in the case of the other train.

When I say it would take one local crew and a half to man a through train, I referred to the State law of California which prohibits the movement of trains with more than four passenger cars with less than a conductor and two brakemen; these local [96] trains have less than four cars, and therefore, but one brakeman each. Of course, we knew how many cars were in No. 1 when it left Las Vegas, and it was known when it left Crucero that it could not get in within the 16 hours. I don't think there were any crews at either Otis or San Bernardino that we could rely on to take No. 7 in. The same conditions applied that night as it did next morning; there were no crews available next morning. We had regularly assigned crews at each terminal, and we kept men for emergencies at Las Vegas and Los Angeles, but not at Otis or San Bernardino. So far as I know, at that time the only place from which we could have gotten relief crews was Los Angeles. This applies to No. 1 on the 3d and No. 7 on the 4th.

Land slides and washouts between Daggett and

(Testimony of Carl P. Smith.)

Crucero are frequent. We have had a number of slides, but none which tied up the road previous to that time. We never had a serious one before. The seriousness of this one could not have been appreciated or known when No. 1 left Las Vegas. The bridge that was encountered on the Tonopah & Tidewater was about a quarter of a mile from Crucero, where they went back and waited until it was repaired—they waited at Crucero and didn't go back to Crucero after the bridge was repaired. Crucero was not a terminal of any kind, but simply a crossing of two railroads.

No. 1 left Crucero finally at 3:00 A. M. October 4th, and its running time from Crucero to Los Angeles was 8 hours and 35 minutes, that is, when there was no detouring. When we detour a train we run it part of the way over the line of some other road, and as a matter of practical operation, when you detour a train, you never can tell what delays will be encountered on the line of the other road, because while the train is on the line of the foreign company it is under the jurisdiction of the dispatchers of the foreign line. In the cases of trains Nos. 1 and 7, as a matter of fact, they were laid out while being detoured to give [97] the other line's trains precedence. After trains Nos. 1 and 7 left Crucero until they got to Colton, the dispatchers of the Salt Lake road had no jurisdiction over them. While on the Tonopah & Tidewater road, they were under the jurisdiction of that company's dispatchers, and after they left Ludlow until they reached Colton they were

(Testimony of Carl P. Smith.)

under the jurisdiction of the Santa Fe dispatchers. The Santa Fe dispatcher handling trains from Daggett to Colton is a joint dispatcher when the regular run of the train is handled by a dispatcher. It is not necessarily true that the road over whose line you detour trains gives a right of way to their trains over yours; that depends upon the importance of the train. In case of both these trains, the detour movement was over when they got to Daggett. The Salt Lake road had no joint dispatcher, either with the Tonopah & Tidewater, nor with the Santa Fe between Ludlow and Daggett, but from Daggett to Los Angeles a different condition prevailed, because there it was a joint track.

Referring to Case No. 106, and to the 1st, 2d and 3d causes of action, Kelso is 236 miles east of Los Angeles, and is between Crucero and Las Vegas. That was a continuous day and night office and was such in January, 1911. We had an operator there named J. H. Grandee, and one named W. T. Dugan. Mr. Grandee performed the duties of agent for the company, and also telegraph operator, handling train orders, messages, Western Union messages, express matter, mail. Mr. Dugan was a telegraph operator, using the telegraph line in receiving and transmitting telegraph orders, Mr. Grandee's hours of service at that station, on January 19th, 1911, was from 8:00 A. M. to 8:00 P. M. He worked continuously 12 hours that day. The orders he handled were pertinent to and affected the movement of trains coming from Nevada and also going from Cali-

(Testimony of Carl P. Smith.)
fornia to Nevada; they were regular interstate trains.

Referring to the second and third causes of action, Mr. Dugan on January 19th, 20th and 21st, 1911, was on duty from 8:00 P. M [98] to 8:00 A. M., he was in service continuously 12 hours. He quit at 8:00 A. M. on the 20th, and went to work again at 8:00 P. M. on the 20th, and worked until 8:00 A. M. on the 21st, during which time he was engaged in handling the telegraph wires and delivering train orders that affected the movement of interstate trains.

Referring to the 4th cause of action, Otis is a continuous day and night office. J. B. Foster was operator there, one of them. His work was the same as that of the operator at Kelso; he was at the telegraph receiving and delivering train orders. On January 18th, 1911, he went on duty at 2:00 P. M. and worked until 4:30 A. M. January 19th, being in continuous service 14 hours and 30 minutes as a telegraph operator. At Kelso there were three operators regularly employed. The two men were kept on overtime because one of the operators, W. F. Starkey became ill on January 16th. At this time the office at Kelso was under the supervision of the chief dispatcher at Las Vegas. When Starkey was taken ill and the chief dispatcher at Las Vegas was apprised of the fact, he wired to Los Angeles on the morning of the 17th, asking for a relief operator. He wired the Superintendent of Telegraph, who employs the telegraph operators. The Superintendent

(Testimony of Carl P. Smith.)

of Telegraph did not secure a man to take Starkey's place at Kelso, and on the evening of the 17th, the dispatcher at Las Vegas borrowed an operator who was employed in the Las Vegas telegraph office, and started him to Kelso that night. This was the first train from Las Vegas to Kelso after it was learned a man could not be gotten from Los Angeles. When the train reached Lyons, a point between Kelso and Las Vegas, it was derailed and turned over, damaging the equipment and blocking the main line, injuring 14 passengers. The operator who was on this train No. 1, was instructed by the Chief Dispatcher to establish a telegraph office at the wreck in order that he could communicate with headquarters and report conditions and progress there, and enable the dispatcher to move the trains [99] around the wreck when the line was clear. In establishing an office on the line at a wreck, this is a practice we follow on all occasions, as it enables us to clear the line much more quickly. This operator established an office at the wreck and remained until relieved on the evening of January 19th, the Chief Dispatcher at Las Vegas having employed a man to relieve him and sent him out on No. 1 to the wreck. The operator who had been working at the wreck, boarded the same train on which the relief men arrived and went to Kelso. In view of the shortage of help, I would say that a substitute operator was sent to Kelso as expeditiously as could have been done to take the place of Starkey. At that time telegraph operators were extremely scarce.

(Testimony of Carl P. Smith.)

The Western Union and Postal Companies were using a great many operators, and the men preferred to work in Los Angeles rather than go to the desert points, such as Kelso and Otis; they are both in the desert. At that time we had difficulty in getting operators to go there.

The reason for keeping operator Foster on duty 14 and a half hours at Otis on that day was this: Otis is a continuous telegraph office and there were three operators during the 24-hour period. On January 17th, one of these operators, Casey by name, went on duty at the usual time, 10 P. M., apparently in good condition. About 1:20 A. M. January 18th, it was discovered that Casey was under the influence of liquor. He was relieved from duty and operator C. H. Perry called to take his place. He worked continuously until 2:00 P. M. January 18th, making a period of service of 12 hours and 40 minutes consecutively. At 2:00 P. M. Perry was relieved by Foster, who remained on duty until 4:30 A. M. January 19th, a period of 14 hours and 30 minutes, or 1 hour and 30 minutes in excess of the time allowed; that is, in excess of the 13 hours allowed in emergency. He was kept on duty because when Casey became intoxicated and the fact was known that he was to be relieved from duty, operator Williams was employed at Daggett to [100] fill the vacancy; that was during the day of January 18th. He had instructions to go to Otis on No. 2, due to arrive at Otis at 2:45 A. M. January 19th. He failed to put in an appearance when the train arrived, and oper-

(Testimony of Carl P. Smith.)

ator Foster, who was then on duty, sent a messenger for operator Perry to go on duty to relieve him. Had Williams arrived on No. 2 and immediately relieved Foster, Foster's hours of service would have been 12 hours and 45 minutes. It was not known before the train got there that Williams would not arrive on it. The arrangements to send him there were made as soon as the discharge of Casey was known. Mr. Williams' statement after his arrival was that he had become suddenly ill prior to the arrival of his train at Daggett, the one he was intending to take. As soon as it was known that Williams would not come on that train, Perry was gotten to the office to relieve Foster as soon as it was practicable. He had to be called from his sleep. The telegraph office at Otis at that time could not have been closed without interfering with the operation of the road, and the same thing was true of Kelso at the time of the alleged violations. This was a helper terminal; that is, a point where they call helper engines to assist both freight and passenger trains up the mountain.

Referring to the case of trains that were towed in, of which I spoke in my testimony, about keeping up steam for purposes of lubrication, that meant that as long as an engine is under steam or not, the lubrication boxes or valves are taken care of automatically, but when the engine becomes cold the lubrication must be done by hand, and it was to save hand labor that the steam was kept up, and for no other purpose.

(Testimony of Carl P. Smith.)

Referring to the detoured trains 1 and 7, they both carried the United States mail. Las Vegas was a terminal from which they started their runs on the occasions in question, and the next terminal for these trains was Los Angeles. That was the condition that prevailed at the time in question. [101]

Running over the regular run, the distance from Las Vegas to Los Angeles is 334 miles. The schedule running time of train No. 1 from Las Vegas to Los Angeles was 13 hours and 30 minutes, and the running time of No. 7 between the same points was 11 hours and 28 minutes. Under normal conditions neither train ever had any difficulty in getting to Los Angeles on time, as provided by the schedule.

The local trains I spoke of, running between Los Angeles and San Bernardino, entered and left San Bernardino on the Southern Pacific track by reason of a joint track agreement with that Company. That road was separate and distinct from the Santa Fe, over which Nos. 1 and 7 arrived at and left San Bernardino. After leaving Las Vegas, the next passenger terminal for trains 1 and 7 was Los Angeles, that is to say, the passenger crews of these trains ran regularly from Las Vegas to Los Angeles, and *vice versa*.

Referring to the first cause of action in case No. 106, on January 19th, 1911, which was Thursday of that week, operator Grande worked 12 hours; it is also true that on Monday, the 16th, Tuesday, the 17th, and Wednesday the 18th, Mr. Grande was required to work 12 hours each day. It is also true

(Testimony of Carl P. Smith.)

that Mr. Dugan was required to work from 8:00 P. M. on the 16th of that month, to 8:00 A. M. of the 17th, and he was also required to work that length of time on Monday of that week. It is also true that he was required to work from 8:00 P. M. of the 17th, to 8:00 A. M. of the 18th, a period of 12 hours. It is also true that from 8:00 P. M. of the 18th, to 8:00 A. M. of the 19th, Mr. Dugan was required to work 12 hours. So that he worked on Monday, Tuesday, Wednesday, Thursday and Friday 12 hours each.

On the entire road from Salt Lake City to Los Angeles, there were at that time 71 telegraph offices, and in them there were employed 106 operators. A great many of them were 3-men offices, continuously operated, and others were two-men offices. They [102] were three-men offices where they were continuously operated. At that time we kept no standing list of reserve operators to relieve regular operators. If a man got sick and quit work, we had to trust to finding someone from off the line to take his place, or depend upon employing one for that purpose.

In the case of Mr. Foster at Otis, named in the 4th cause of action, Foster and Perry could have arranged to work 12 hours each for the three days until we could relieve them, but on the day Foster performed this excess service of 1 hour and 30 minutes over the 13 hours, had he known that his relief would not arrive on No. 2, the second operator would have been called at the expiration of the 12 hours. This

(Testimony of Carl P. Smith.)

arrangement would have been made if we had known that operator Williams would not arrive. Williams, who was to come from Daggett, was not employed by the company at Daggett; he was a new man that we picked up. No other effort was made by the Superintendent of Telegraph to see that Williams actually went on the train, other than that he had Williams' assurance that he would go, but to my knowledge there was no effort made to see that he actually did go.

Referring to train No. 7, in case No. 243, I have no record of the hours of service of the operator at Hesperia. I don't think that Lugo, where the wreck occurred, was a day and night office, and I can't state the exact hour when the wreck occurred —I should say about 4 P. M. October 4th,—may be a little bit later, about 5 P. M. I fixed that time from the arrival of No. 7 at Hesperia, which was 5:35 P. M. It left there about 1:53 A. M. the following day. The running time from Hesperia to San Bernardino was 25 minutes. It is a fact that when we knew these trains were going to exceed the 16-hour limit, we could have gotten relief for them by sending men out from Los Angeles.

There was no further or additional testimony introduced at the trial. [103]

Whereupon the Court gave to the jury the following instruction:

[Instruction of the Court to the Jury.]

The COURT.—In the two cases, gentlemen of the jury, of the United States of America against San

Pedro, Los Angeles & Salt Lake Railroad Company —one of them is numbered 106 and the other 243— which, by reason of their consolidation, have been tried together, the facts are agreed upon. There is no controversy but that in all of the cases mentioned in the complaint—both complaints—the employees named in each count were permitted to remain on service for periods longer than those allowed by the statute. In each case the defendant has sought to justify the detention or the allowing of these employees to remain on service. The facts are agreed upon, and hence it is a matter of law for the Court to determine. And upon these agreed facts I shall hold, and do hold, as matter of law, that none of the defenses to any of the causes of action, except the fourth cause of action in complaint number 106, are good. The Court therefore instructs you—and it is your duty to obey the instructions of the Court—to find in favor of the plaintiff on each count of the complaint in each case, except the fourth count or the fourth cause of action in the complaint in case 106, and on that cause of action you will return a verdict in favor of the defendant. Submit the form of verdict to the jury, and let one of your number be selected as foreman and let him sign the verdict.

And the Court gave to the jury no further or other instruction.

And the defendant then and there, while the jury were in the box, excepted separately to such instruction to the jury as directed them to find for the plaintiff in each cause of action stated in the two

cases, except that part of said instruction as directed the jury to find for the defendant. [104]

Exception No. 1.

In the two cases, gentlemen of the jury, of the United States of America against San Pedro, Los Angeles & Salt Lake Railroad Company—one of them is numbered 106 and the other 243—which, by reason of their consolidation, have been tried together, the facts are agreed upon. There is no controversy but that in all of these cases mentioned in the complaint—both complaints—the employees named in each count were permitted to remain on service for periods longer than those allowed by the statute. In each case the defendant has sought to justify the detention or the allowing of these employees to remain on service. The facts are agreed upon, and hence it is a matter of law for the Court to determine. And upon these agreed facts I shall hold, and do hold, as matter of law, that none of these defenses to any of these causes of action, except the fourth cause of action in complaint number 106, is good. The Court therefore instructs you—and it is your duty to obey the instructions of the Court—to find in favor of the plaintiff on each count of the complaint in each case except the fourth count or the fourth cause of action in the complaint in case 106, and on that cause of action you will return a verdict in favor of the defendant. Submit the form of verdict to the jury, and let one of your number be selected as foreman and let him sign the verdict.

And the defendant then and there, while the jury were in the box, excepted separately to such instruc-

tion to the jury as directed them to find for the plaintiff in each cause of action stated in the two cases, except that part of said instruction as directed the jury to find for the defendant.

Thereupon the jury returned a verdict in favor of the plaintiff in words and figures as follows:

"In the District Court of the United States, for the Southern District of California, Southern Division.

Nos. 106 and 243, Consolidated.

THE UNITED STATES OF AMERICA,

Plaintiffs,

versus

SAN PEDRO, LOS ANGELES & SALT LAKE [105] RAILROAD COMPANY, a Corporation,

Defendant.

We, the jury in the above-entitled cause, under the instructions of the Court, find for the plaintiff in the first, second and third cause of action alleged in complaint in case No. 106, Civil, and each and every of the twenty-two causes of action alleged in complaint in case No. 243, Civil, and for the defendant in the fourth cause of action alleged in complaint in case No. 106, Civil.

Los Angeles, California, October 8th, 1913.

ISAAC B. NEWTON,

Foreman."

The foregoing, containing all the evidence offered at the trial of said causes, and the instructions of the Court to the jury, with the defendant's exception

thereto, and containing all the proceedings on the trial of said causes, to and including the verdict of the jury, is hereby offered as the defendant's proposed Bill of Exceptions.

PENNEL CHERRINGTON,
Attorney for Defendant.

Service of the foregoing Bill of Exceptions accepted, and a copy thereof received this 28th day of February, 1914.

ALBERT SCHOONOVER,
U. S. Attorney,
MONROE C. LIST,
Spec'l Asst. U. S. Attorney,
HARRY R. ARCHBALD,
Asst. U. S. Attorney,
Attorneys for Plaintiff. [106]

[Stipulation for Settlement and Allowance of Bill of Exceptions.]

It is hereby stipulated that the foregoing Bill of Exceptions is a true and correct Bill of Exceptions, and that the same may be settled and allowed by the Court.

Dated this 3d day of March, 1914.

ALBERT SCHOONOVER,
U. S. Attorney,
MONROE C. LIST,
Specl. Asst. U. S. Atty.,
HARRY R. ARCHBALD,
Asst. U. S. Atty.,
Attorneys for Plaintiff.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing Bill of Exceptions, containing all of the evidence offered and introduced at the trial of said cause, and the instructions of the Court to the jury, with the defendant's exceptions thereto, and containing all of the proceedings at the trial of said cause, to and including the verdict of the jury, is a true and correct Bill of Exceptions, and is hereby settled and allowed, and ordered to be filed.

Dated this 4th day of March, 1914.

OLIN WELLBORN,
Judge.

[Endorsed]: No. 106, 243, Civil. U. S. District Court, Ninth District, Southern District of California. The United States of America, Plaintiff, vs. San Pedro, Los Angeles & Salt Lake Railroad Co., Defendant. Engrossed Bill of Exceptions. Filed Mar. 4, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502–4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [107]

[Defendant's Exhibit—The Hours-of-Service Law.]

INTERSTATE COMMERCE COMMISSION.

THE HOURS-OF-SERVICE LAW AND ADMINISTRATIVE RULINGS AND OPINIONS THEREON.

Printed by Order of the Commission March 25, 1912.

106-243 Civil.
U. S.
vs.
S. P. L. A. & S. L. Rd. Co.
Filed October 7, 1913.
Defendants Exhibit.
Wm. M. Van Dyke, Clerk,
By C. E. Scott,
Deputy Clerk.

Washington,
Government Printing Office,
1912. [108]

THE INTERSTATE COMMERCE COMMISSION.

CHARLES A. PROUTY, of Vermont.
JUDSON C. CLEMENTS, of Georgia.
FRANKLIN K. LANE, of California.
EDGAR E. CLARK, of Iowa.
JAMES S. HARLAN, of Illinois.
CHARLES C. McCHORD, of Kentucky.
BALTHASER H. MEYER, of Wisconsin.
JOHN H. MARBLE, Secretary. [109]

THE HOURS-OF-SERVICE LAW.

An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon. (34 Stat. L., ch. 2939, pp. 1415, 1416.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such

employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive [110] hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or

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remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period of not exceeding three days in any week: Provided further, The Interstate Commerce Commission may after full hearing in a particular case and for a good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any

employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce [111] Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: Provided further, That the provision of this act shall not apply to the crews of wrecking or relief trains.

Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provision of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act.

Sec. 5. That this act shall take effect and be in force one year after its passage.

Public, No. 274, approved March 4, 1907, 11:50 a. m.

CONFERENCE RULINGS ON THE HOURS-OF-SERVICE LAW BY THE COMMISSION.

April 7, 1908.

56. HOURS-OF-SERVICE LAW—STREET-CAR COMPANIES.—Upon inquiry whether the hours-of-service law applies to electric street-car lines which are interstate carriers: Held, That it applies to all railroads subject to the provisions of the act to regulate commerce, as amended, including street railroads when engaged in interstate commerce. (See Rule 287.)

May 5, 1908.

74. HOURS-OF-SERVICE LAW.—Employees deadheading on passenger trains or on freight trains and not required to perform, and not [112] held responsible for the performance of, any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading "on duty" as that phrase is used in the act regulating the hours of labor. (See Rule 287-b.)

June 25, 1908.

88. HOURS-OF-SERVICE LAW.—(a) The specific proviso of the law in regard to hours of service is:

"That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers

orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period *on* not exceeding three days in any week."

These provisions apply to employees in towers, offices, places, and stations, and do not include train employees who, by the terms of the law, are permitted to be or remain on duty sixteen hours consecutively or sixteen hours in the aggregate in any twenty-four-hour period, and who may occasionally use telegraph or telephone instruments for the receipt or transmission of orders affecting the movement of trains. (See Rule 287.)

(b) Section 3 of the law provides that:

"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where [113] the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law

to that trip. (See Rule 287.)
November 10, 1908.

108. HOURS-OF-SERVICE LAW—FERRY EMPLOYEES.—The hours-of-service law does not apply to employees on a ferry, even though the ferry be owned by a railroad company. The law applies to employees connected with the movement of trains, and hence does not embrace employees engaged only in the operation of a ferry. This ruling does not apply to car ferries. (See Rule 287.)
April 4, 1910.

275. HOURS-OF-SERVICE LAW — TRAIN BAGGAGEMEN.—The provisions of section 1 of the hours-of-service law apply to train baggagemen who are employees of the railway company and who are required by the rules of the company to perform or to hold themselves in readiness, when called upon, to perform any duty connected with the movement of any train. (See Rules 74 and 287.)
March 16, 1908.

287. THE HOURS-OF-SERVICE LAW.—(a) The provisions of this act apply to all common carriers by railroad in the District of Columbia, or in any Territory of the United States, or engaged in the movement of interstate or foreign traffic; and to all employees of such common carriers who are engaged in or connected with the movement of any train carrying traffic in the District of Columbia, or in any Territory, or carrying interstate or foreign traffic. (See Rule 56.)

(b) Sec. 2. The requirement for ten consecutive hours off [114] duty applies only to such em-

ployees as have been on duty for sixteen consecutive hours. The requirement for eight consecutive hours off duty applies only to employees who have not been on duty sixteen consecutive hours, but have been on duty sixteen hours in the aggregate out of a twenty-four-hour period. Such twenty-four-period begins at the time the employee first goes on duty after having had at least eight consecutive hours off duty. The term "on duty" includes all the time during which the employee is performing service, or is held responsible for performance of service. An employee goes "on duty" at the time he begins to perform service or at which he is required to be in readiness to perform service, and goes "off duty" at the time he is relieved from service and from responsibility for performance of service. (Qualified by Rule 74.)

(c) The act does not specify the classes of employees that are subject to its terms. All employees engaged in or connected with the movement of any train as described in section 1 are within its scope. Train dispatchers, conductors, engineers, telegraphers, firemen, brakemen, train baggagemen who, by rules of carriers, are required to perform any duty in connection with the movement of trains, yardmen, switch-tenders, tower-men, block-signal operators, etc., come within the provisions of the statute. (Qualified by Rules 108 and 275; see also Rule 88.)

(d) The proviso in section 2 covers every employee who, by the use of the telegraph or telephone, handles orders pertaining to or affecting train move-

ments. In order to preserve the obvious intent of the law this provision must be construed to include all employees, who, by the use of an electrical current, handle train orders or signals which control movements of trains. (See Rule 88.) [115]

(e) The prime purpose of this law is to secure additional safety by preventing employees from working longer hours than those specified in the act. Therefore a telegraph or telephone operator who is employed in a night and day office may not be required to perform duty in any capacity or of any kind beyond nine hours of total service in any twenty-four-hour period.

(f) The phrase "towers, offices, places, and stations" is interpreted to mean particular and definite locations. The purpose of the law and of the proviso for nine hours of service may not be avoided by erecting offices, stations, depots, or buildings in close proximity to each other and operating from one a part of the day while the other is closed, and *vice versa*.

The statute is remedial in its intent and must have a broad construction, so that the purpose of the Congress may not be defeated.

(g) The Commission interprets the phrase "continuously operated night and day" as applying to all offices, places, and stations operated during a portion of the day and a portion of the night a total of more than thirteen hours.

The phrase "operated only during the daytime" refers to stations which are operated not to exceed thirteen hours in a twenty-four-period, and is not

considered as meaning that the operator thereat may be employed only during the daytime.

(h) The act provides that operators employed at night and day stations or at daytime stations may in case of emergency be required to work four additional hours on not exceeding three days in any week. Manifestly, the emergency must be real and one against which the carrier cannot guard.

"In any week" is construed to mean in any calendar week, beginning with Sunday.

(i) Sec. 3. The instances in which the act will not apply [116] include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point. (See Rule 88.)

"Casualty," like its synonyms "accident" and "misfortune," may proceed or result from negligence or other cause known or unknown. (Words and Phrases Judicially Defined, vol. 2, 1003.)

Act of God. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight, and pains, and care reasonable to have been expected. (Bouvier's Law Dictionary, vol. 1, 79.)

(j) It will be noted that the penalties for violation of this act are against the "common carriers, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty" in

violation of the law. It is clear that the officers and agents of carriers who are liable to the penalties provided in the act are those who have official direction or control of the employees; and that the penalties do not attach to the employees who, subject to such supervision or control, perform the service prohibited.

(k) Sec. 4. To enforce this act the Interstate Commerce Commission has all the powers which have been granted to it for the enforcement of the act to regulate commerce, including authority to appoint employees, to require reports, to examine books, papers, and documents, to administer oaths, to issue subpoenas, and to interrogate witnesses. [117] February 12, 1912.

342. HOURS-OF-SERVICE LAW.—A trainman required by the rules of the carrier, in conjunction with his duties as trainman, to send, receive or deliver orders affecting the movement of trains comes within the proviso of section 2 of the hours-of-service act, and therefore a carrier may not require a trainman, who has been on duty longer than the limit of time fixed for a telegraph or telephone operator, to send, receive, or deliver orders affecting the movement of trains as a part of the duties regularly assigned to him.

But upon inquiry whether the practice of requiring conductors of trains delayed at stations where there is no regularly assigned telegraph or telephone operator on duty, and conductors of trains about to be overtaken by superior trains, to telephone or telegraph the train dispatcher for instructions is in ac-

cord with the act and with the Commission's order of interpretation of June 25, 1908, Held, That a trainman who has been on duty for more than 9 hours or for more than 13 hours is not prohibited from occasionally using the telegraph or telephone to meet an emergency. [118]

In the United States District Court for the Southern District of California, Southern Division.

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

Assignment of Errors.

Comes now the defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-en-

titled causes, petition for which writ of error is filed at the same time with this assignment of errors.

I.

The Trial Court erred in instructing the jury as follows:

"In the two cases, gentlemen of the jury of the United States of America against San Pedro, Los Angeles & Salt Lake Railroad Company—one of them is numbered 106 and the other 243—which, by reason of their consolidation, have been tried together, the facts are agreed upon. There is no controversy but that in all of the cases mentioned in the complaint—both complaints—the employees named in each count were permitted to remain on service for periods longer than those allowed by the statute. In each case the defendant has sought to justify the detention or the allowing of these employees to remain on service. The facts are agreed upon, and hence it is a matter of law for the Court to determine. [119] And upon these agreed facts I shall hold, and do hold, as matter of law, that none of the defenses to any of the causes of action, except the fourth cause of action in complaint number 106, are good. The Court therefore instructs you—and it is your duty to obey the instructions of the Court—to find in favor of the plaintiff on each count of the complaint in each case, except the fourth count or the fourth cause of action in the complaint in case 106, and on that cause of action you will return a verdict in favor of the defendant. Submit the form of verdict to the jury, and let one of your number be selected as foreman and let him sign the verdict."

II.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the first cause of action in case 106.

III.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the second cause of action in case 106.

IV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the third cause of action in case 106.

V.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 1st cause of action in case 243.

VI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 2nd cause of action in case 243. [120]

VII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 3d cause of action in case 243.

VIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 4th cause of action in case 243.

IX.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 5th cause of action in case 243.

X.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 6th cause of action in case 243.

XI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 7th cause of action in case 243.

XII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 8th cause of action in case 243.

XIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 9th cause of action in case 243.

XIV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 10th cause of action in case 243. [121]

XV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 11th cause of action in case 243.

XVI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 12th cause of action in case 243.

XVII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 13th cause of action in case 243.

XVIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 14th cause of action in case 243.

XIX.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 15th cause of action in case 243.

XX.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 16th cause of action in case 243.

XXI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 17th cause of action in case 243.

XXII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 18th cause of action in case 243. [122]

XXIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 19th cause of action in case 243.

XXIV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 20th cause of action in case 243.

XXV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 21st cause of action in case 243.

XXVI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 22d cause of action in case 243.

XXVII.

The Court erred in overruling and denying the defendant's motion for a new trial.

PENNEL CHERRINGTON,
Attorney for Defendant.

And upon the foregoing assignment of errors, and upon the record in said causes, the defendant prays that said verdict and judgment be reversed.

Dated March 31, 1914.

PENNEL CHERRINGTON,
Attorney for Defendant. [123]

Service of the foregoing Assignment of Errors is hereby admitted, and a copy thereof received, this 2nd day of April, 1914.

ALBERT SCHOONOVER,
U. S. Atty.,
HARRY R. ARCHBALD,
Asst. U. S. Atty.,
Attorneys for Plaintiff.

[Endorsed]: No. 106 and 243 Cons. U. S. District Court, Ninth District, Southern District of California. United States of America, Pl., vs. San Pedro, Los Angeles and Salt Lake R. R. Co., Defendant. Assignment of Errors. Filed Apr. 2, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [124]

In the United States District Court for the Southern District of California, Southern Division.

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Defendant.

Petition for Writ of Error and Supersedeas.

San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, defendant in the above-entitled consolidated causes, feeling itself aggrieved by the verdict of the jury and the judgment entered on October 8th, 1913, comes now, by Pennel Cherrington, its Attorney, and files herewith an Assignment of Errors, and petitions said Court for an order allowing said defendant to procure a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the

United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the termination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated, March 31, 1914.

PENNEL CHERRINGTON,
Attorney for Defendant. [125]

Service of the within Petition is hereby admitted, and a copy thereof received, this 2d day of April, 1914.

ALBERT SCHOONOVER,
U. S. Atty.,
HARRY R. ARCHBALD,
Asst. U. S. Atty.,
Attorneys for Plaintiff.

[Endorsed]: No. 106 and 243, Cons. U. S. District Court, Ninth District, Southern District of California. United States of America, Plaintiff, vs. San Pedro, Los Angeles and Salt Lake R. R. Co., Defendant. Petition for Writ of Error and Supersedeas. Filed Apr. 2, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [126]

In the United States District Court for the Southern District of California, Southern Division.

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Defendant.

Order Allowing Writ of Error.

Upon motion of Pennel Cherrington, attorney for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court for the Ninth Circuit, the verdict and judgment heretofore entered herein.

Dated April 2d, 1914, at Chambers.

OLIN WELLBORN,

Judge.

Service of the above Order is hereby admitted, and a copy thereof received, this 2d day of April, 1914.

ALBERT SCHOONOVER,
HARRY R. ARCHBALD,
Attorneys for Plaintiff.

[Endorsed]: No. 106 and 243, Cons. U. S. District Court, Ninth District, Southern District of California. United States of America, [127] Pl., vs. San Pedro Los Angeles and Salt Lake R. R. Co., Defendant. Order Allowing Writ of Error. Filed Apr. 2, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles Cal., Solicitor for Defendant. [128]

In the United States District Court for the Southern District of California, Southern Division.

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

Order Staying Proceedings.

The defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, having this day filed its petition for a writ of error from the verdict and judgment made and entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of the security which the defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and said petition having this day been duly allowed—

NOW, THEREFORE, it is ordered that upon said defendant filing with the Clerk of this Court a good and sufficient bond in the sum of Six Thousand Dollars ($6,000.00), to the effect that if the said defendant and plaintiff in error shall prosecute the said writ of error with effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and

virtue, the said Bond to be approved by the clerk of this Court, that all further proceedings [129] in this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

Dated, April 2d, 1914, at Chambers.

OLIN WELLBORN,
Judge.

Service of a copy of the above order is hereby admitted, this 2d day of April, 1914.

ALBERT SCHOONOVER,
HARRY R. ARCHBALD,
Attorneys for Plaintiff.

[Endorsed]: No. 106 and 243, Cons. U. S. District Court, Ninth District, Southern District of California. United States of America, Pl., vs. San Pedro, Los Angeles and Salt Lake R. R. Co., Defendant. Order Staying Proceedings. Filed Apr. 2, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [130]

In the United States District Court for the Southern District of California, Southern Division.

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS; That we, San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto The United States of America, the plaintiff above named, in the sum of Six Thousand Dollars ($6,000.00), to be paid to said The United States of America, to which payment, well and truly to be made, we *bond* ourselves, jointly and severally, and our and each of our suc-

cessors and assigns, firmly by these presents.

Sealed with our seals, and dated this 2 day of April, A. D. 1914.

WHEREAS, the above-named defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled consolidated causes by the United States District Court for the Southern District of California, Southern Division, rendered and entered in said causes on the 8th day of October, 1913.

NOW THEREFORE, the condition of this obligation is such that if the above-named San Pedro, Los Angeles & Salt Lake Railroad [131] Company shall prosecute said writ to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
By H. L. NUTT,
Its General Manager.

NATIONAL SURETY COMPANY OF NEW YORK.
By CHAS. SEYLER, Jr.,
Its Attorney in Fact.

Affidavit and Acknowledgment by Surety Company.

State of California,
County of Los Angeles,—ss.

On this 2d day of April, A. D. 1914, before me personally came Chas. Seyler, Jr., known to me to be

the Attorney-in-Fact of the National Surety Company, the corporation described in and which executed the within Bond as a Surety thereon, and who, being duly sworn, did depose and say that he signed his name thereto by order and authority of the Board of Directors of said company, and that he affixed its Corporate Seal thereto by like order and authority.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal, the day and year first above written.

[Seal] HAZEL JONES,
Notary Public in and for Los Angeles County.

Approved:

OLIN WELLBORN,
Judge. [132]

[Endorsed]: Nos. 106 and 243, Civil. U. S. District Court, Ninth District, Southern District of California. The United States of America vs. San Pedro, Los Angeles & Salt Lake Railroad Co., Defendant. Bond. Filed Apr. 3, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [133]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

CLERK'S OFFICE.

Two Cases—Nos. 106 and 243 Civil, Consolidated.

THE UNITED STATES OF AMERICA

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY.

Praecipe [for Certified Copy of Record].

To the Clerk of Said Court:

Sir: Please issue a certified copy of the record in the above-entitled consolidated causes, consisting of—

Judgment-roll,
Bill of Exceptions,
Petition for Writ of Error,
Assignment of Errors,
Order Denying Motion for New Trial,
Supersedeas Bond,
Writ of Error,
Order Allowing Writ of Error,
Citation in Error,
—and Defendant's Exhibit; said record to be certified under the hand of the Clerk and the seal of the court.

Dated this 3d day of April, 1914.

PENNEL CHERRINGTON,
Attorney for Defendant.

[Endorsed]: Nos. 106 and 243, Consolidated. U. S. District Court, Southern District of California, Southern Division. The United States of America v. San Pedro, Los Angeles & Salt Lake Railroad [134] Co. Praecipe for Record. Filed Apr. 4, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [135]

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and thirty-five (135) typewritten pages, numbered from 1 to 135 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Judgment-roll, order Denying Motion for New Trial, Bill of Exceptions, Defendant's Exhibit, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error, Order Staying Proceedings, Supersedeas Bond and Praecipe for Transcript, in the above and therein-entitled causes, and that the same together constitute the record in said consolidated cause, as specified in the said Praecipe filed in my office on behalf of the plaintiff in error by its attorney of record. [136]

I do further certify that the cost of the foregoing record is $72.50, the amount whereof has been paid me by the San Pedro, Los Angeles & Salt Lake Railroad Company, the plaintiff in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 22d day of April, in the year of our Lord one thousand nine hundred and fourteen, and of our Independence the one hundred and thirty-eighth.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States of America, in and for the Southern District of California. [137]

[Endorsed]: No. 2412. United States Circuit Court of Appeals for the Ninth Circuit. San Pedro, Los Angeles & Salt Lake Railroad Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received and filed April 23, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2412

United States

Circuit Court of Appeals

For the Ninth Circuit.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Appeal from the United States District Court for the Northern District of California, Second Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2412.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Order of Submission.

ORDERED, above-entitled causes argued by Mr. James E. Kelby, counsel for the plaintiff in error San Pedro, Los Angeles & Salt Lake Railroad Company, a Corporation, by Messrs. E. W. Camp and Paul Burks, counsel for the Atchison, Topeka & Santa Fe Railway Company, a Corporation, and by Mr. Philip J. Doherty, Special Assistant United States Attorney, and counsel for the defendants in error, The United States of America, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the first day of February, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2412.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

ORDERED, that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a judgment or decree be filed, and recorded in the Minutes of this Court, in each of the causes in accordance with the opinion filed therein: * * * San Pedro, Los Angeles & Salt Lake Railroad Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. * * *

[Opinion, U. S. Circuit Court of Appeals.]

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2412.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge:

Two actions brought in the court below by the Government against the San Pedro, Los Angeles & Salt Lake Railroad Company—one there numbered 106 and the other 243—were consolidated for trial before the Court with a jury, and were submitted upon an agreed statement of facts and upon the uncontradicted testimony of one witness, sworn on behalf of the plaintiff in the action. The cases have also been submitted together here. Both actions were based upon the act of Congress known as the "Hours of Service Act," approved March 4, 1907, entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours

of service of employees thereon," 34 St. Lg. 1415.

The complaint in case numbered 106 contained five counts, one of which was withdrawn by the plaintiff, and in respect to one of which a verdict for the defendant company was returned under instructions of the Court, leaving the first three counts of that complaint for consideration here.

The second section of the act of Congress provides:

"That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or go again on duty without having had at least eight consecutive hours off duty: *Provided*, that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in

case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

The third section provides the penalties for violations of the provisions of Section 2 and for prosecutions of such violations, and contains two provisos, the first of which is as follows:

"*Provided*, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

The first count of the complaint in case numbered 106 alleges, among other things, that the defendant company, during the twenty-four hour period beginning at 8 o'clock A. M. of January 19, 1911, required and permitted its telegraph operator at Kelso, California,—one Grandee—to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to wit, from 8 o'clock A. M. to 8 o'clock P. M. of said 19th day of January; that Kelso was at that time a continuous night and day telegraph station, and that Grandee, while so required and permitted to remain on duty during the said twelve hours, by the use of the telegraph or telephone dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

The second and third counts of that complaint

contain similar averments in respect to the defendant company's operator Dugan, of whom, in the second count, it is alleged that he was required and permitted to be on duty as such operator at the same station from 8 o'clock P. M. of January 19, 1911, to 8 o'clock A. M. of January 20, 1911; and in the third count that Dugan was required and permitted to be on duty as such operator from 8 o'clock P. M. of January 20, to 8 o'clock A. M. of January 21, 1911.

The answer of the defendant company as amended set up in substance this justification of its action: That at the time in question the force of telegraphers employed at Kelso consisted of an agent operator whose regular hours were from 8 o'clock A. M. to 4 o'clock P. M., and two other telegraph operators whose hours were from 4 o'clock P. M. to 12 o'clock midnight, and from 12 o'clock midnight to 8 o'clock A. M. respectively; that on January 16, 1911, one Starkey, one of the regular telegraph operators at the station mentioned, whose hours were from 4 o'clock P. M. to 12 o'clock midnight, was taken suddenly ill and became incapacitated for service; that Kelso is a helper terminal and important telegraph station continuously operated day and night; that at the time Starkey was taken ill there was no available operator at Kelso to replace him, and that it was necessary for the company to procure another operator and send him to Kelso, and that as soon as possible the defendant did procure an operator named Ham and sent him to Kelso for service to take the place of Starkey, and that Ham began his service

as soon as possible, to wit, January 20, 1911, by reason of all of which an emergency arose and existed which made it imperative for the defendant company to require the said Grandee to work over time as alleged in the complaint.

A similar answer and alleged justification was pleaded by the defendant company to the second and third counts of the complaint in case 106.

The evidence showed the facts to be that Kelso is a station of the defendant company on the desert 236 miles east of Los Angeles, situated between the stations Crucero and Las Vegas, and was at the times in question a continuous day and night office of the company; that Grandee was the agent of the company at that station, as well as one of the telegraph operators—Dugan and Starkey being the other two operators—in receiving and transmitting telegraph orders pertaining to and affecting the movement of trains passing between Nevada and California.

We extract from the uncontradicted testimony of the witness Smith, who was chief clerk of the superintendent of the defendant railroad company, as follows:

"The two men (Grandee and Dugan) were kept on overtime because one of the operators, W. F. Starkey, became ill on January 16th. At this time the office at Kelso was under the supervision of the chief dispatcher at Las Vegas. When Starkey was taken ill and the chief dispatcher at Las Vegas was apprised of the fact, he wired to Los Angeles on the morning of the 17th, asking for a relief operator.

He wired the Superintendent of Telegraph, who employs the telegraph operators. The Superintendent of Telegraph did not secure a man to take Starkey's place at Kelso, and on the evening of the 17th, the dispatcher at Las Vegas borrowed an operator who was employed in the Las Vegas telegraph office, and started him to Kelso that night. This was the first train from Las Vegas to Kelso after it was learned a man could not be gotten from Los Angeles. When the train reached Lyons, a point between Kelso and Las Vegas, it was derailed and turned over, damaging the equipment and blocking the main line, injuring 14 passengers. The operator who was on this train No. 1, was instructed by the Chief Dispatcher to establish a telegraph office at the wreck in order that he could communicate with headquarters and report conditions and progress there, and enable the dispatcher to move the trains around the wreck when the line was clear. In establishing an office on the line at a wreck, this is a practice we follow on all occasions, as it enables us to clear the line much more quickly. This operator established an office at the wreck and remained until relieved on the evening of January 19th, the Chief Dispatcher at Las Vegas having employed a man to relieve him and sent him out on No. 1 to the wreck. The operator who had been working at the wreck, boarded the same train on which the relief men arrived and went to Kelso. In view of the shortage of help, I would say that a substitute operator was sent to Kelso as expeditiously as could have been done to take the place of Starkey. At that time telegraph

operators were extremely scarce. The Western Union and Postal Telegraph companies were using a great many operators, and the men preferred to work in Los Angeles rather than go to the desert points, such as Kelso and Otis; they are both in the desert. At that time we had difficulty in getting operators to go there."

Starkey's illness certainly caused a sudden and unexpected occasion for action on the part of the railway company; a pressing necessity—an emergency, that fairly came within the meaning of the statute. An emergency existing, the defendant company by the first proviso to Sec. 2 of the act was expressly authorized to permit Grandee and Dugan each to remain on duty for four additional hours in the twenty-four hour period on not exceeding three days in any week. The case shows that each of them remained on duty for *three* additional hours in a twenty-four hour period during the 16th, 17th, and 18th days of January. Then the overtime permitted them during that week by the proviso of Sec. 2 of the act of Congress above quoted ended, and if there were nothing more to the case we would have no difficulty in affirming the action of the court below in directing a verdict for the plaintiff upon the first three counts in case 106, for the evidence is that Grandee and Dugan continued to work overtime during the 20th and for part of the 21st of January. But the uncontradicted proof shows that the defendant company on the 17th of January started an operator—one Ham—to Kelso from Las Vegas, to take the place of Starkey in ample time to have done so

before the expiration of the three day period during which Grandee and Dugan were each authorized by the statute to work four additional hours in each twenty-four hour period. But unfortunately the train on which Ham was proceeding was derailed at a point between Las Vegas and Kelso, turned over, injuring fourteen passengers and damaging the equipment of the train and blocking the main line. Because of that disaster Ham was instructed by the chief dispatcher of the road to establish a telegraph office at the wreck in order that he could communicate with headquarters and report conditions and progress there, and enable the dispatcher to move the trains around the wreck when the line was cleared, which he did, resulting in the necessary continuance of overtime work by Grandee and Dugan during the 20th and 21st of January. And the question is whether that accident or casualty rendered the act in question inapplicable. We are of the opinion that it clearly did. See United States v. Missouri Pac. Ry. Co., 213 Fed. 169, 175–6.

For the reasons stated the judgment of the court below, in so far as counts 1, 2 and 3 of the complaint in case 106 are concerned must be reversed.

In the case numbered in the court below 243 it is strenuously insisted by counsel for the plaintiff in error that the Court erred in directing the jury to return a verdict for the plaintiff upon counts 3, 4, 5, 6, 7, and 8 of the complaint in that case.

The third count of that complaint alleges a violation of the act of Congres in that the defendant company on October 3, 1912, on its line between Las

Vegas, Nevada, and Los Angeles, California, required and permitted its conductor, Brown, to be and remain on duty as such, in connection with its train No. 1, drawn by locomotive No. 3434 engaged in interstate commerce, for a period in excess of sixteen consecutive hours; and its fourth and fifth counts are identical with the third, except that in the fourth brakeman Edwards and in the fifth brakeman Berringer are included.

The evidence showed without conflict that train No. 1, which was a passenger train, arrived at Las Vegas, which was a terminal station, October 3, 1912, between the hours of 5 and 5:32 P. M. There the train crew was changed, the outgoing crew, consisting of Brown, Edwards, and Berringer, leaving Las Vegas in charge of the train at 5:45 P. M. of that day and so remained in charge of its movement until it reached Los Angeles, the place of its destination, at 8 P. M. of the succeeding day; so that, including the preparatory period of 42 minutes, that crew remained in service 27 continuous hours. The schedule running time of that train between the points named was 13 hours and a half. The train left Las Vegas on schedule time, but subsequently a heavy land-slide occurred on the defendant company's line between its stations Otis and Crucero, due to heavy rains, which slide was of such character and magnitude as to stop traffic over the road and compel the detour of train No. 1 over the lines respectively of the Tonopah & Tidewater and the Santa Fe Companies—over that of the former from Crucero, the junction of the lines of the defendant

company and the Tonopah & Tidewater Company, to Ludlow, the junction of the last-named company and the Santa Fe Company, and over the latter from Ludlow to Daggett. The rails of the Tonopah Company being light necessarily required slow running, especially in view of the condition of the ground, occasioned by the heavy rains, all of which resulted in many delays which were beyond the power of the defendant company to prevent; and none of which could have been foreseen by the defendant company at the time the train left Las Vegas, nor could the necessity of such detour have been then foreseen. When the train reached Daggett the prescribed 16-hour period had expired—17 hours and 5 minutes having been expended in making that run. At Daggett the engine crew of train No. 1 was relieved, but not its conducter nor brakeman, they having continued on to the destination of the train at Los Angeles. San Bernardino, situated between Daggett and Los Angeles, and 60 miles east of the latter city, is a passenger terminal, but not for through trains; two local passenger train crews lay over there every night, each having one brakeman only. From the evidence it cannot be doubted that the train crew of train No. 1 could have been relieved both at San Bernardino and at Daggett, and the real question in regard to that crew is whether the act of Congress under consideration required the defendant company to do so.

To such an enactment these observations of the Supreme Court in the case of United States v. Dickson, 15 Pet. 141, 163, are very pertinent:

"The general rule of law which has prevailed, and become consecrated almost as a maxim in the interpretation of statutes, (is) that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reasons thereof."

To hold that the act under consideration is made inapplicable by any and every delay that is the result of a cause not known to the carrier, or its officer or agent in charge of such employee, at the time the latter leaves a terminal, and which could not have been foreseen, would be nothing short of making it a dead letter. Manifestly the whole act must be taken together and be so construed as to give effect to its humane purpose, and at the same time to give the railroad companies the benefit of the exceptions and provisos in all cases fairly brought within their terms and true intent. There can be no doubt that the paramount purpose of the act was to prevent the overworking of the employees, to the end that their efficiency be not impaired, and that the obligation was thereby imposed upon the carriers to comply with that requirement, unless prevented therefrom because of a valid excuse, secured to them by the provisos and exceptions contained in the act, which was not made effective within the usual time but its going into effect postponed for one year—the pur-

pose being, as said by the Supreme Court in the case of Northern Pacific Railway Company v. Washington, 222 U. S. 370, 379, "to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act." It would seem to follow necessarily that in order for the carrier to justify the excess of service beyond the fixed period prescribed by the act, it must show that the same was not in any respect occasioned by the lack of that high degree of care and foresight properly required of the carrier, but was the direct result of an act of God, a casualty, unavoidable accident, or of delay that was the result of a cause not known to the carrier or its officer or agent in charge of such employee, at the time the latter left a terminal, and which could not have been foreseen.

In the very recent case of Great Northern Railway Co. v. United States, decided October 28, 1914, by the Circuit Court of Appeals of the Eighth Circuit, that court expressly held, among other things, that the proviso in Sec. 3 of the act under consideration

"Does not relieve the officials in charge of train crews from exercising proper diligence to avoid working them over time, and proper diligence requires train officials to know whether or not engines and cars are in proper condition for use when starting them upon a run."

In the preceding case of United States v. Kansas City Southern Ry. Co., 202 Fed. 828, 833, the same court having under consideration the act of March 4, 1907, said:

"By the terms of the proviso the carrier is excused 'where the delay is the result of a cause not known * * * at the time said employee left a terminal, and which could not have been foreseen.' Not merely which was not foreseen, but which *could not have been* foreseen. The phrase 'by the exercise of due diligence and foresight' is not present. Counsel argue that by leaving out this phrase Congress intended to limit the liability of the carrier, that it meant to imply that what was not actually foreknown could not, in contemplation of this law, have been foreseen. We cannot assent to this interpretation. Clearly Congress did not intend to relieve the carrier from responsibility in guarding against delays in a matter deemed to be of such importance. By this act it sought to prevent railroad employees from working consecutively longer than the period prescribed, as completely and effectively as could be accomplished by legislation. To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at, and the practical operation of its railroad. Conformably to this view it has been uniformly held by the courts that, ordinarily, delays in starting trains by reason of the fact that another train is late; from side-tracking to give superior trains the right of way, if the meeting of such trains could have been anticipated at the time of leaving the starting point; from getting out of steam or cleaning fires; from defects in equipment; from switching; from time taken for meals; and in short from all the usual

causes incidental to operation—are not, standing alone, valid excuses within the meaning of this proviso. The carrier must go still farther and show that such delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded."

Such was the view of this court in the case of United States v. Northern Pacific Railway Co., 215 Fed. 64, where the accident under consideration was the sole cause why the crew there in question was engaged on its run for more than sixteen hours without a rest of eight consecutive hours.

In the somewhat analogous case of Newport News & M. Val. Co. v. United States, 61 Fed. 488, 490, involving the act of Congress forbidding interstate carriers of animals from confining them for more than 28 consecutive hours without unloading them for rest, water, and food, unless prevented "by storm or other accidental causes" the Circuit Court of Appeals of the Sixth Circuit, speaking through Judge Lurton, said:

"Congress did not mean that simply because the carrier had encountered a storm, therefore he should be excused. It must appear that the storm 'prevented' obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable, by reason of a storm, to comply with the law, then he has been unavoidably 'prevented' from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, be-

cause 'his own negligence is the last link in the chain of cause and effect, and in law the proximate cause' of the failure to comply with the law. Therefore, to avail himself of the excuse of 'storm,' the carrier must show, not only the fact of a storm, but that with due care he was 'prevented,' as an unavoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression 'other accidental causes'.

"If the storm is no excuse, unless its unavoidable effect was to prevent compliance, then it follows that no other accidental causes would be an excuse, unless that cause and its effect are likewise unavoidable. The meaning of the general words, 'other accidental causes,' must be ascertained by referring to the preceding special words. The rule 'noscitur a sociis' is clearly applicable. A storm is unavoidable, in the sense that it cannot be prevented. 'Other accidental causes' must be taken to mean other unavoidable accidental causes. An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention, but an effect of that negligence. What is an inevitable or unavoidable accident has been very thoroughly considered by this court in the case of Weeks v. Transit Co., 61 Fed. 120. It was there said that an inevitable accident—

" 'Was an occurrence which could not be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under

the circumstances of the particular case.'

"Again, we said:

" 'An accident is said to be inevitable when it is not occasioned in any degree, either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise.'

"These definitions apply to an unavoidable accident, which is, in the sense of the law, an inevitable occurrence, as defined in that case, and those cited therein. If the accident was one which might have been avoided by due care, then the carrier must be taken to have contemplated the reasonable consequences of his own negligence."

As under the evidence there can be no doubt that the land-slide was the direct and necessary cause of the detour of the train in question and of its numerous delays, and that therefore the defendant company was entirely justified in continuing in service its train crew up to the time it could, with the exercise of proper diligence have relieved it, it is plain that the action of the court below in directing a verdict for the plaintiff on counts 3, 4, and 5 must have been based on the view that the defendant company had the opportunity to relieve that crew either at San Bernardino or Daggett, or both, and was by the statute, properly construed, required to avail itself of it; in which view we think, for the reasons already stated, the court was right—being unable to agree with the learned counsel for the defendant company that by the adoption of the first proviso to the third section of the act "it was the intention of Congress to permit a crew starting from a terminal

to remain with the train overtaken by delay, casualty, or unavoidable accident, until the end of the *run.*"

In support of that contention counsel earnestly rely upon Ruling 88 of the Interstate Commerce Commission made May 25, 1908, which after quoting the first proviso of Sec. 3 of the act, reads:

"Any employee so delayed may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

That ruling must be read and considered in connection with the preceding ruling of the Commission made March 16, 1908, which reads as follows:

"287(i) Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point"; and must also be read and considered in connection with the action of the Commission shown by the record in this case, that the suit was directed to be brought by the Attorney General at the request of the Interstate Commerce Commission.

But over and above that, it is the obvious duty of the Court to give effect to what it conceives to be the true construction of the act of Congress.

What has been above said in respect to counts 3, 4, and 5 of the complaint in case No. 243 in the court

below equally governs the proper disposition of counts 6, 7, and 8 of the same complaint.

The result is that the judgment of the court below in so far as concerns counts 1, 2, and 3 of case No. 106 in the court below must be and hereby is reversed, and the cause remanded for new trial thereon, and as to the judgment of the court below in respect to case No. 243 of that court, its judgment must be and is affirmed.

[Endorsed]: Opinion, U. S. Circuit Court of Appeals. Filed Feb. 1, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2412.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Judgment [U. S. Circuit Court of Appeals].

In Error to the District Court of the United States for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Southern Division, and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the

said District Court in so far as concerns counts 1, 2 and 3 of Case No. 106 in the said District Court be, and hereby is reversed, and that this cause be, and hereby is remanded for a new trial thereon, and as to the judgment of the said District Court in respect to case No. 243 of that court, its judgment must be, and hereby is affirmed.

[Endorsed]: Judgment, U. S. Circuit Court of Appeals. Filed and Entered February 1, 1915. [Signed] F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the eighth day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2412.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross and William W. Morrow, Circuit Judges, before whom the case was heard, it is ORDERED that the Petition, filed March 3, 1915, on behalf of the plaintiff in error for a Rehearing of the above-entitled cause be, and hereby is denied.

At a stated term, to wit, the October term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the twelfth day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2412.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Order Staying and Suspending Proceedings and Withholding Issuance of Mandate Under Rule 32 to and Including May 11, 1915.

The plaintiff in error, San Pedro, Los Angeles & Salt Lake Railroad Company, having this day filed its petition in this Court for an order to stay the issuance of the Mandate of this Court in the above-entitled cause, and to suspend further proceedings therein, for a period of sixty days next after the filing of said petition, for the purpose of enabling it to obtain a review of the judgment of this Court in the Supreme Court of the United States by *certiorari*; and it being made to appear to this Court that said petitioner intends in good faith to take proceedings to obtain a review of said judgment; and it further appearing that a reasonable time for that purpose will not be less than sixty days from this date, and also, that the plaintiff in error has heretofore in this cause in the court below, given a bond which was approved by that court in connection with writ of error, and to answer all damages and costs, and that said bond is still in full force and effect.

Now, therefore, it is ORDERED that said petitioner shall have sixty days from this date within which to perfect proceedings to obtain a review of the judgment of this Court by the Supreme Court of the United States by *certiorari*, or other proper method, and that meanwhile all proceedings of this Court shall be, and hereby are, stayed and suspended, and its mandate withheld.

At a stated term, to wit, the October term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the third day of May, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2412.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Order Staying Mandate to and Including June 10, 1915, etc.

On consideration of the oral motion of Mr. Thomas R. White, on behalf of counsel for the plaintiffs in error, and on consideration of the stipulation of Mr. United States Attorney Albert Schoonover, this day filed, consenting thereto, it is ORDERED that the mandate under Rule 32 of this Court in the above-entitled cause be, and hereby is stayed to and including June 10, 1915, to enable the plaintiff in error to apply to the Supreme Court of the United States for the issuance of a writ of certiorari in the above-entitled cause, provided that the said application be made with diligence.

[Praecipe for Certified Transcript of Record, etc.]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2412.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

To the Clerk of the Said Court:

Sir: Please make and furnish me with a certified printed Transcript of the Record (including the proceedings had in said Circuit Court of Appeals) and not less than thirty uncertified copies thereof, for use on an application to be made to the Supreme Court of the United States for the issuance of a writ of certiorari under Section 240 of the Judicial Code, in the above-entitled cause, the said Transcript to consist of a copy of the following:

1. Printed Transcript of Record on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz.:

2. Order of Submission, entered Oct. 6, 1914.

3. Order Directing Filing of Opinion, etc., entered Feb. 1, 1915.

4. Opinion, filed Feb. 1, 1915.

5. Judgment, filed and entered Feb. 1, 1915.

6. Order Denying Petition for a Rehearing, entered March 8, 1915.

7. Order entered March 12, 1915, staying issuance of mandate, etc.

8. Order entered May 3, 1915, staying issuance of mandate, etc.

9. Praecipe for certified Transcript of Record, etc., and

10. Certificate of Clerk U. S. Circuit Court of Appeals to said Transcript.

Please prepare thirty or more uncertified printed copies of said record by printing thirty or more copies of the above-mentioned proceedings that were had and papers that were filed in said cause in said Circuit Court of Appeals, and by binding one of the latter printed copies of said proceedings, etc., at the end of thirty of more extra copies of the printed Transcript of Record on which said cause was heard in said Circuit Court of Appeals.

A. S. HALSTEAD,
J. E. KELBY,
Counsel for Plaintiff in Error.

[Endorsed]: Praecipe for Certified Transcript of Record, etc. Filed April 24, 1915. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventeenth day of May, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable FRANK H. RUDKIN, District Judge.

No. 2412.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Order Staying Issuance of Mandate Under Rule 32 to and Including October 18, 1915.

On consideration of the oral motion of Mr. Thomas R. White, made on behalf of counsel for the plaintiff in error, and pursuant to the Stipulation of counsel for the respective parties, this day filed therefor, and it appearing to the Court that the Interstate Commerce Commission consents thereto, and good cause therefore appearing, it is ORDERED that the issuance of the Mandate under Rule 32 of this court in the above-entitled cause be, and hereby is stayed to and including October 18, 1915.

At a stated term, to wit, the October Term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable FRANK H. RUDKIN, District Judge.

No. 2412.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Order Allowing Plaintiff in Error Until November 17, 1915, to Move for and Perfect Proceedings to Obtain a Review of Judgment Herein in Supreme Court U. S. etc.

On consideration of the oral motion made by Mr. Thomas R. White on behalf of counsel for the plaintiff in error, and pursuant to the stipulation, signed by Mr. United States Attorney Albert Schoonover, of counsel for the defendant in error, this day filed therefor, it is ORDERED that the plaintiff in error may have to and including November 17, 1915, in

which to move for and perfect proceedings to obtain a review of the judgment of affirmance of this Court in the above-entitled cause in the Supreme Court of the United States by certiorari, and that the issuance of the Mandate under Rule 32 of this Court in the above-entitled cause be, and hereby is stayed to and including November 17, 1915.

No. 2412.

In the United States Circuit Court of Appeals for the Ninth Circuit.

(Consolidated.)

No. 106—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 243—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Petition for Writ of Error from Supreme Court U. S. and Order Allowing Writ of Error.

Comes now San Pedro, Los Angeles & Salt Lake

Railroad Company, a corporation, plaintiff in error, and respectfully shows that the above-entitled consolidated causes are now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment therein was rendered on the 1st day of February, 1915, affirming a judgment of the United States District Court for the Southern District of California, Southern Division, in favor of the Defendant in Error, for penalties in the sum of Twenty-nine Hundred and Fifty Dollars ($2950.00), together with interest and costs, (said judgment being for an amount in excess of One Thousand Dollars, exclusive of interest and costs); that the motion for rehearing of said cause was denied on the 8th day of March, 1915, and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on writ of error.

WHEREFORE, San Pedro, Los Angeles & Salt Lake Railroad Company, prays that a writ of error issue in this behalf to the Supreme Court of the United States, and that the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit be directed to send the records, proceedings and papers in said consolidated causes, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the Assignment of Errors herewith filed by the Plaintiff in Error may be reviewed, and, if error be fouud, corrected according to the laws and customs of the United States.

Dated, at Los Angeles, California, this 12th day of October, 1915.

A. S. HALSTED,
JAMES E. KELBY,
T. R. WHITE,
Attorneys for Plaintiff in Error.

Writ of Error allowed, this 19th day of October, 1915.

WM. B. GILBERT,
Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Petition for Writ of Error from Supreme Court U. S. Filed Oct. 19, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

Received copy of the within Petition for Writ of Error, this 12th day of Oct. 1915.

CLYDE R. MOODY,
Asst. U. S. Atty.,
Solicitor for Defendant in Error.

No. 2412.

In the United States Circuit Court of Appeals for the Ninth Circuit.

(Consolidated.)

No. 106—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 243—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Assignment of Errors Upon Writ of Error from Supreme Court U. S.

Comes now San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, plaintiff in error, and shows that in the record herein there is manifest error, and that the United States Circuit Court of Appeals for the Ninth Circuit erred in this, to wit:

ASSIGNMENT I.

In sustaining the action of the trial Court in refusing to direct a verdict in favor of Plaintiff in Error upon each the third to eighth counts or causes of action inclusive in consolidated case No. 243—Civil, as set forth respectively in Assignments VII to XII inclusive, urged before the Circuit Court of Appeals for the reason that it affirmatively appears, not only from the record before it, but from the opinion of said last-named court:

1. That the trains of which the employees named in said counts were in charge, had been delayed by casualties and unavoidable accidents after such trains and employees had started upon their respective runs, and before the expiration of sixteen hours;

2. That the delays to which said trains, and the

employees in charge thereof were subject, were the results of causes not known to the Plaintiff in Error, or to any of its officers or agents in charge of such employees, at the time such employees left a terminal—Las Vegas—and which could not have been foreseen;

ASSIGNMENT II.

In refusing to sustain the first assignment of errors presented to it, and urged by the Plaintiff in Error, as follows:

"I. The trial Court erred in instructing the jury as follows: In the two cases, gentlemen of the jury of the United States of America against San Pedro, Los Angeles & Salt Lake Railroad Company—one of them is numbered 106 and the other 243—which, by reason of their consolidation, have been tried together, the facts are agreed upon. There is no controversy but that in all of the cases mentioned in the complaint—both complaints—the employees named in each count were permitted to remain on service for periods longer than those allowed by the statute. In each case the defendant has sought to justify the detention of the allowing of these employees to remain on service. The facts are agreed upon, and hence it is a matter of law for the Court to determine. And upon these agreed facts I shall hold, and do hold, as matter of law, that none of the defenses to any of the causes of action, except the fourth cause of action in complaint number 106, are good. The Court therefore instructs you—and it is your duty to obey the instructions of the Court—to find in favor of the plaintiff on each count of the complaint in each case,

except the fourth count or fourth cause of action in the complaint in case 106, and on that cause of action you will return a verdict in favor of the defendant. Submit the form of verdict to the jury, and let one of your number be selected as foreman and let him sign the verdict."

ASSIGNMENT III.

In affirming the verdict and judgment of the trial Court, based upon the 3d to 8th counts or causes of action inclusive, in consolidated case No. 243, for the reason that it affirmatively appears from the record which was before said Circuit Court of Appeals, that the service of each of the employees described in each of said respective causes of action, was not in violation of the Act of Congress entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by limiting the Hours of Service of Employees thereon," approved March 4, 1907 (34 St. L. 1415), because said act does not by its terms prohibit, but does, on the contrary, expressly authorize, such service, under such circumstances disclosed by the record, and, because said Circuit Court of Appeals expressly found that the delays to which the trains of which said employees were in charge were subject, were the results of casualties, unavoidable accidents, and acts of God, and of causes which were not known to the plaintiff in error, or to any of its officers or agents in charge of said employees, at the time they left their terminal at Las Vegas, and which could not have been foreseen.

ASSIGNMENT IV.

In not reversing the verdict and judgment of the

trial court in so far as it was based upon the 3d to 8th counts or causes of action respectively, in consolidated case No. 243, for the reason that it affirmatively appears from the record before said Circuit Court of Appeals that the service of the employees in said causes of action described, was justified by reason of the proviso found in section 3 of said Act of Congress, approved March 4, 1907 (34 St. L. 1415).

ASSIGNMENT V.

In interpreting and construing said Act of Congress, approved March 4, 1907 (34 St. L. 1415), and in holding and deciding that by the terms thereof the plaintiff in error was, with respect to the employees in charge of both train No. 1 and train No. 7, "only justified in continuing in service its train crews up to the time it could, with the exercise of proper diligence, have relieved it," for the reasons—

1. That said Court expressly found that said train No. 1 and train No. 7, were both overtaken by casualties and unavoidable accidents before the expiration of sixteen hours, in view of which finding the law—said Act of Congress—imposed upon the plaintiff in error no duty of relieving the crews in charge of said trains either at San Bernardino or at Daggett.

2. That said Court expressly found that said trains No. 1 and No. 7, were both delayed before the expiration of sixteen hours from the time said employees in charge thereof went on duty, as the results of causes not known to the plaintiff in error, or any

of its officers or agents in charge of the respective members of the crews of said trains, when the employees constituting such crews left their terminal at Las Vegas, which was the commencement of their run, in view of which express finding the said Act of Congress imposed no duty upon the plaintiff in error of relieving said crews in charge of said trains, either at Daggett or at San Bernardino, or at any other point short of Los Angeles, which was the destination of said trains, and the final terminal, or end of the run or trip, of the crews in charge thereof.

3. That said holding and decision gives no effect to the proviso found in section 3 of said Act of Congress, but, on the contrary, deprives said proviso of its obvious meaning and intent.

4. That the effect of said holding and decision is to impose upon plaintiff in error duties and requirements in addition to those imposed by the terms of the said Act, and to subject the plaintiff in error to penalties in said Act mentioned in those cases and under those circumstances, when, by its terms "the provisions of this act shall not apply."

5. That the effect of said holding and decision is to impose upon plaintiff in error, arbitrarily and without legislative sanction, the duty of relieving from service employees who are delayed by causes and under circumstances which, by the clear and express terms of said Act of Congress, toll its operation and render its provisions no longer applicable to such employees.

6. That the effect of said holding and decision is to substitute the construction of the Court for the

practical contemporaneous construction put upon said Act by the Administrative Body expressly empowered thereby "to execute and enforce its provisions," and also, to nullify, set aside and hold for naught, without clear or cogent reasons, the Interstate Commerce Commission's Ruling No. 88, of June 25, 1908, which was promulgated as a rule for the guidance of plaintiff in error and other carriers subject to the provisions of said Act of Congress, and which was reported to Congress as such by said Interstate Commerce Commission.

7. That the effect of said holding and decision is to make an Act, which, by the express will of Congress, was clearly not an offense *when* it was performed, an offense *after* it was performed.

ASSIGNMENT VI.

In holding and deciding that subdivision "(i)" of Administrative Ruling No. 287, promulgated by the Interstate Commerce Commission under date of March 16, 1908, modified Administrative Ruling No. 88, promulgated by the same body on June 25th, 1908, for the reasons:

1. That said two Administrative Rulings being necessarily inconsistent, the Court erred in not giving effect to Ruling No. 88, of June 25, 1908, which was later in point of time;

2. That the Court's interpretation and construction of subdivision "(i)" of Ruling No. 287, is erroneous.

3. That the Court should have accepted and applied the Interstate Commerce Commission's Administrative Ruling No. 88, of June 25, 1908, as one

of practically contemporaneous construction placed upon the proviso found in section 3 of said Act of Congress by the body expressly charged by the terms of said Act with its enforcement.

4. The Court should have held that said Ruling No. 88, of June 25, 1908, was a rule of property and conduct, and should have sustained that ruling as being later in point of time, for the reason that it is necessarily inconsistent with the earlier Administrative Ruling No. 287; and for the further reason that it is the only Administrative Ruling which the Interstate Commerce Commission in any of its Annual Reports ever submitted to Congress; and for the further reason that Congress, by inaction, concurred in the interpretation of the proviso to said Act so communicated to it by said Commission.

ASSIGNMENT VII.

That said Circuit Court of Appeals erred in holding, by its opinion affirming said judgment of the trial Court, that the action of plaintiff in error in requiring and permitting the members of the crew of train No. 1 (described in the 3d, 4th and 5th causes of action of the complaint in consolidated case No. 243), and the members of the crew of train No. 7 (described in the 6th, 7th and 8th causes of action of the complaint in consolidated case No. 243), to continue on duty, and to continue their run to Los Angeles, was in violation of said Act of Congress known as the Hours of Service Act, approved March 4, 1907 (14 St. L. 1415), and in holding that said Act required that said employees be relieved before their arrival at Los Angeles, for the reasons:

1. That it affirmatively appears from the record which was before said Circuit Court of Appeals, and from the opinion of said Court, that the trains of which said employees were, and each of them was, in charge, had, after starting upon their runs and before the expiration of sixteen hours, been justifiably delayed by reason of casualties and unavoidable accidents.

2. That it affirmatively appears from the record which was before said Circuit Court of Appeals, and from the opinion of said court, that the delays to which said, and each of said, trains were subject, were the results of causes not known to the plaintiff in error, or to any of its officers or agents in charge of said employees at the time said employees left their terminal at Las Vegas, and which could not have been foreseen.

3. That by the express terms of said Hours of Service Act, none of the provisions of said Act were applicable to the employees of said trains after the delays so resulting from casualties and unavoidable accidents, and from causes which were not known to the plaintiff in error, and which could not have been foreseen at the time said employees left their terminal at Las Vegas, from which they started on their run to Los Angeles.

ASSIGNMENT VIII.

That the ruling and decision of said Circuit Court of Appeals is contrary to the plain meaning and intent, and to the express provisions, of said Act of Congress known as the Hours of Service Act, approved March 4, 1907 (34 St. L. 1415).

WHEREFORE, the plaintiff in error prays that said judgment in respect to each the 3d, 4th, 5th, 6th, 7th and 8th counts or causes of action in case No. 243–Civil—may be reversed in all things.

Dated this 12th day of October, 1915.

A. S. HALSTED,
JAMES E. KELBY,
T. R. WHITE,
Attorneys for Plaintiff in Error.

[Endorsed]: Assignment of Errors upon Writ of Error from Supreme Court U. S. Filed Oct. 19, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

No. 2412.

In the United States Circuit Court of Appeals for the Ninth Circuit.

(Consolidated.)

No. 106—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 243—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Order Allowing Writ of Error from Supreme Court U. S. and Fixing Amount of Supersedeas Bond.

On the 19th day of October, 1915, came the plaintiff in error, San Pedro, Los Angeles & Salt Lake Railroad Company, by its attorneys, and filed herein, and presented to the Court, its petition praying for the allowance of a writ of error intended to be urged by it, praying also that the transcript of records, proceedings and papers in said entitled consolidated causes, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, said writ of error is allowed upon said plaintiff in error giving bond according to the laws of the United States, in the sum of Seven thousand Dollars ($7,000.00), which shall operate as a supersedeas bond.

And it is further ordered that said petition be, and the same is, hereby allowed and granted, and that the writ of error be allowed in said consolidated causes, returnable before the United States Supreme Court on the 18th day of December, 1915, and that

the clerk of this court sign and seal the writ, and that a transcript of the record and of all proceedings and papers in said entitled consolidated causes shall be made and transmitted to said United States Supreme Court.

It is further ordered that the undertaking in the sum of Seven Thousand Dollars ($7,000.00) tendered by said plaintiff in error, be, and the same is, hereby approved as the undertaking on writ of error herein.

Dated at San Francisco, California, this 19th day of October, 1915.

WM. B. GILBERT,
Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Order Allowing Writ of Error from Supreme Court U. S. and Fixing Amount of Supersedeas Bond. Filed Oct. 19, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

No. 2412.

In the United States Circuit Court of Appeals for the Ninth Circuit.

(Consolidated.)

No. 106—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 243—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Supersedeas Bond on Writ of Error from Supreme Court U. S. and Order of Approval.

KNOW ALL MEN BY THESE PRESENTS: That we, San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, as principal, and National Surety Company, a corporation, as surety, are held and firmly bound unto The United States of America, in the sum of Seven Thousand Dollars ($7,000.00) to be paid to said The United States of America, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, successors and assigns, firmly by these presents.

Sealed with our seals, and dated this 12th day of October, 1915.

WHEREAS, the above-named plaintiff in error, San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, has sued out a writ of error to the Supreme Court of the United States, to reverse a judgment of the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled consolidated causes, and entered on the 15th day of February, 1915, affirming a judgment in the above-

entitled consolidated causes for the sum of $2,959.00, together with interest and costs, made and entered in favor of the defendant in error and against the plaintiff in error, on or about the 8th day of October, 1914, by the United States District Court in and for the Southern District of California, Southern Division, a rehearing of which said consolidated causes was, on the 8th day of March, 1915, denied by said United States Circuit Court of Appeals for the Ninth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the above-named San Pedro, Los Angeles & Salt Lake Railroad Company, shall prosecute said writ to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
Principal,
By H. C. NUTT,
Its General Manager.

NATIONAL SURETY COMPANY,
By W. NANARY,
Resident Vice-president.

[Seal] B. S. McBRIDE,
Resident Assistant Secretary.

The foregoing Bond is approved, both as to form and amount, and as to the sufficiency of the Surety, this 9th day of October, 1915.

WM. B. GILBERT,
Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

AFFIDAVIT, ACKNOWLEDGMENT, AND JUSTIFICAION BY GUARANTEE OR SURETY COMPANY.

State of California,
County of Los Angeles,—ss.

On this 12th day of October one thousand nine hundred and fifteen before me personally came H. F. Stewart, known to me to be the Resident Vice-president of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of San Pedro, Los Angeles, & Salt Lake R. R. Co., as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of Los Angeles, State of California; that he is the Resident Vice-president of said Company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of San Pedro, Los Angeles & Salt Lake R. R. Co., is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company; that lie signed his name thereto by like order and authority as Resident Vice-president of said Company; that he is acquainted with B. S. McBride and knows her to be the Resident Assistant Secretary of said Company; that the signature of said B. S. McBride subscribed to said Bond is in the genuine handwriting

of said B. S. McBride, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Two Million ($2000,000) Dollars.

That Frank L. Gilbert is agent to acknowledged service for said Company in the Judicial District wherein this bond is given.

H. F. STEWART,
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 12th day of October, 1915.

[Seal] HAZEL JONES,
(Officer's Signature, description and seal.)
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Supersedeas Bond upon Writ of Error from Supreme Court U. S. and Order of Approval. Filed Oct. 19, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

No. 2412.

In the United States Circuit Court of Appeals for the Ninth Circuit.

(Consolidated.)

No. 106—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 243—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Praecipe for Certified Transcript of Record Upon Return of Writ of Error from Supreme Court U. S.

To the Clerk of Said Court:

Please make and furnish me with a certified printed transcript of the record (including all the proceedings had in said Circuit Court of Appeals) and not less than thirty uncertified copies thereof, to be filed in the Supreme Court of the United States pursuant to writ of error allowed in the above-entitled cause, the said transcript to consist of a copy of the following:

1. Printed transcript of record on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had and all the papers that were filed in said Circuit Court of Appeals, viz.:

2. Order of Submission entered October 6, 1914.

3. Order Directing Filing of Opinion, etc., entered February 1, 1915.

4. Opinion, filed February 1, 1915.

5. Judgment, filed and entered February 1, 1915.

6. Order Denying Petition for a Rehearing, entered March 8, 1915.

7. Order entered March 12, 1915, Staying Issuance of Mandate, etc.

8. Order entered May 3, 1915, Staying Issuance of Mandate, etc.

9. Order entered May 17, 1915, Staying Issuance of Mandate, etc.

10. Order entered October 6, 1915, Staying Issuance of Mandate, etc.

11. Petition for Writ of Error.

12. Assignment of Errors.

13. Order Allowing Writ of Error.

14. Bond.

15. Writ of Error.

16. Citation on Writ of Error.

17. Praecipe for Certified Transcript of Record, etc., and

18. Certificate of Clerk of United States Circuit Court of Appeals to said Transcript.

Please cause to be printed fifty or more uncertified copies of that portion of said record from and includ-

ing the Petition for Writ of Error to and including the Certificate of the Clerk to said Transcript.

A. S. HALSTEAD,
J. S. KELBY,
THOS. R. WHITE,
Counsel for Plaintiff in Error.

[Endorsed]: Praecipe for Certified Transcript of Record upon Return to Writ of Error from Supreme Court U. S. Filed Oct. 29, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2412.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on Return to Writ of Error from Supreme Court U. S.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and ninety-seven (197) pages, numbered from and including 1 to and including 197, to be a true copy of the complete record, made pursuant to the praecipe filed by counsel for the plaintiff in error on the 29th day of October, A. D. 1915, under Rule 8 of the Supreme Court of the United States, in the above-entitled case, including the Assignment of Errors filed on the Writ of Error from said Supreme Court, and of all proceedings had, and of all papers, including the opinion, filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record, on return to the annexed Writ

of Error from the Supreme Court of the United States in the above-entitled cause, as made and certified pursuant to the said praecipe.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this twelfth day of November, A. D. 1915.

[Seal] F. D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

[Cancelled U. S. Internal Revenue 10-¢ Documentary Stamp.]

No. 2412.

In the United States Circuit Court of Appeals for the Ninth Circuit.

(Consolidated.)

No. 106—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 243—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error Returnable in Supreme Court U. S.

United States of America,—ss.

The President of the United States to the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals for the Ninth Circuit, before you, or some of you, between San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, Plaintiff in Error, and The United States of America, Defendant in Error, (consolidated causes) wherein a judgment rendered

against said Plaintiff in Error for a sum in excess of One Thousand Dollars ($1,000.00) exclusive of costs, was affirmed by said United States Circuit Court of Appeals for the Ninth Circuit, manifest error hath happened to the great damage of said Plaintiff in Error, as by its plea appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the records, proceedings and papers aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court of the United States, at Washington, District of Columbia, on the 18th day of December, 1915, that the record and proceedings aforesaid being inspected, said Supreme Court of the United States may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 19th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

[Seal] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by,

WM. B. GILBERT,
Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Writ of Error Returnable in Supreme Court U. S. and Return of U. S. Circuit Court of Appeals for the Ninth Circuit Thereto. Filed Oct. 28, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within Writ of Error.

As within we are commanded, we certify under the Seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

By the Court:

[Seal] F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated November 12, 1915.

By Meredith Sawyer,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled Nov. 12, 1915. F. D. M. By M. S.]

No. 2412.

In the United States Circuit Court of Appeals for the Ninth Circuit.

(Consolidated.)

No. 106—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 243—CIVIL.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Citation upon Writ of Error from Supreme Court U. S.

To the United States of America:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, District of Columbia, sixty days after the date of this citation, pursuant to writ of error allowed and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, wherein San Pedro, Los An-

geles & Salt Lake Railroad Company, a corporation, is plaintiff in error, and you, the United States of America, is defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and reversed, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable WM. B. GILBERT, Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 19th day of October, in the year of our Lord one thousand nine hundred and fifteen.

WM. B. GILBERT,
Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Service of the foregoing Citation, and also of the Writ of Error mentioned therein, is hereby admitted, this 19th day of October, 1915, and we consent that said Citation with this waiver may be filed as complete service upon us.

ALBERT SCHOONOVER,
United States Attorney,
Attorney of Record for Defendant in Error.
By C. R. MOODY,
Asst. U. S. Atty.

[Endorsed]: Citation upon Writ of Error from Supreme Court U. S. Filed Oct. 28, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 716.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD CO., A CORPORATION,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

NOTICE OF MOTION.

SIRS: Please take notice that upon a certified copy of the transcript of the record herein, and upon the annexed petition of San Pedro, Los Angeles & Salt Lake Railroad Company, sworn to on the 29th day of November, 1915, petitioner will move the motion hereto annexed before the Supreme Court of the United States at the Capitol, in the city of Washington, District of Columbia, on Monday, the thirteenth day of December, 1915, at the opening of the court on that date or as soon thereafter as counsel can be heard, and it will then and there move for such further relief in the premises as may be just.

ALEXANDER BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for Petitioner.

Dated Washington, D. C., November 29, 1915.

To John W. Davis, Esq., Solicitor General of the United States, and to Albert Schoonover, Monroe C. List and Philip J. Dougherty, Esqs., attorneys for respondent.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 716.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD CO.,
a Corporation, Petitioner,
vs.
THE UNITED STATES OF AMERICA.

MOTION.

Comes now the petitioner above named, by Alexander Britton, Evans Browne, and F. W. Clements, its attorneys and counsel, and moves this court, upon a certified copy of the transcript of the record herein, and upon the annexed petition, sworn to on the 29th day of November, nineteen fifteen, for a writ of certiorari directed to the Circuit Court of Appeals for the Ninth Circuit to bring before this honorable court the case of San Pedro, Los Angeles and Salt Lake Railroad Company, a corporation, plaintiff in error, against the United States of America, defendant in error, for such proceedings therein as to this honorable court may seem just, and for such other and further relief in the premises as may be just.

ALEXANDER BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys and Counsel for Plaintiff in Error, the Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 716.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD CO., *a Corporation, Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR CERTIORARI.

To the Honorable the Supreme Court of the United States:

While, in the above-entitled cause, a writ of error has been allowed and has been docketed in this court, nevertheless, and because there exists in the minds of counsel for plaintiff in error and this petitioner some doubt as to the jurisdiction of this honorable court under that writ of error, your petitioner respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a judgment in favor of the plaintiff in the case of the United States of America *vs.* San Pedro, Los Angeles and Salt Lake Railroad Company, a corporation, and carried to said Circuit Court of Appeals by writ of error, and respectfully shows to this court as follows:

I.

Your petitioner was, at the time of the commencement of the actions hereinafter specified, consolidated, and still is, a corporation, a citizen and resident of the State of Utah, and was at that time, and still is, a common carrier engaged in interstate commerce by railroad in and between the States respectively of Utah, Nevada, and California, and was at that time, and still is, subject to the provisions of an act of

Congress entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service Thereon," approved March 4, 1907 (34 Statutes at Large, p. 1415), which act took effect March 4, 1908.

II.

That on or about the 15th day of September, 1911, the United States of America, as plaintiff, filed its complaint against your petitioner as defendant, in said United States District Court, to recover from your petitioner the sum of $500.00 on each of five separately stated counts or causes of action, each for an alleged violation of said act of Congress, said cause being known and docketed in said court as No. 106, Civil, Southern Division.

That on or about the 7th day of March, 1913, the United States of America, as plaintiff, filed its complaint against your petitioner, as defendant, in the United States District Court for the Southern District of California, Southern Division, to recover from your petitioner the sum of $500.00 on each of twenty-two separately stated counts or causes of action, each for an alleged violation of said act of Congress, said cause being known and docketed in said court as No. 243, Civil, Southern Division.

On or about October 6th, 1913, after the commencement of the trial of said cause No. 106, Civil, said cause No. 243, Civil, was, on motion, by consent of the parties, consolidated with said cause No. 106, Civil, and, as thus consolidated, said causes were tried together in said district court (Tr., pp. 73-4).

III.

Your petitioner by this petition seeks only to challenge and have reviewed so much and such part of the judgment and decision of the said United States Circuit Court of Appeals as directly involves each the third, fourth, fifth, sixth,

seventh, and eighth counts, or causes of action, of complaint in cause No. 243, Civil, in respect to which judgment and decision your petitioner considers itself aggrieved.

Third, Fourth, and Fifth Causes of Action in Case No. 243, Civil.

It was alleged in the third cause of action in said case No. 243, Civil, in substance as follows:

Defendant, beginning at the hour of 5 o'clock p. m. on October 3, 1912, upon its line of railroad at and between the stations of Las Vegas, Nevada, and Los Angeles, California, required and permitted its conductor and employee, one G. D. Brown, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from 5 o'clock p. m. on October 3, 1912, to 8 p. m. on October 4, 1912; that said employee, while so permitted to be and remain on duty, was engaged in and connected with the movement of defendant's train No. 1, drawn by its locomotive No. 3434, said train being then and there engaged in the movement of interstate traffic. That by reason of the violation of said act of Congress defendant is liable, etc. (Tr., pp. 34-35).

The fourth and fifth counts, or causes of action, of said complaint, are identical with the third, save that in the fourth Brakeman Edwards is involved, and in the fifth Brakeman Berringer is involved.

Sixth, Seventh, and Eighth Causes of Action in Case No. 243, Civil.

It was alleged in the sixth cause of action in said case No. 243, Civil, in substance as follows:

Defendant, beginning at the hour of 5:30 a. m. on October 4, 1912, upon its line of railroad at and between the stations of Las Vegas, Nevada, and Los Angeles, California, required and permitted its conductor and employee, one J. F. Fitzpatrick, to be and remain on duty as such for a

longer period than sixteen consecutive hours, to-wit, from 5:30 o'clock a. m. on October 4, 1912, to 6:25 a. m. on October 5, 1912; that said employee, while so permitted to be and remain on duty, was engaged in and connected with the movement of defendant's train No. 7, drawn by its own locomotive engine No. 3433, said train being then and there engaged in the movement of interstate traffic; that by reason of the violation of said act of Congress defendant is liable, etc. (Tr., pp. 37-38).

The seventh and eighth counts or causes of action of said complaint are identical with the sixth, save that in the seventh Brakeman J. S. Roberts is involved, and in the eighth Brakeman C. A. Carter is involved.

IV.

To each of said third, fourth, fifth, sixth, seventh, and eighth counts or causes of action of said complaint (and to each and all of the other causes of action therein), your petitioner interposed an answer in the nature of a specific denial. It was, however, stipulated between the parties to said cause, which stipulation was duly filed and read in evidence, that defendant, your petitioner, might be permitted to make any affirmative defenses under the plea filed by it without the necessity of filing an amended plea (Tr., p. 82 (Stipulation of Facts)); and accordingly all affirmative defenses were open to your petitioner and were availed of and presented to the court and considered and determined by it; said affirmative defenses so accruing and available to your petitioner and tendered by it under its said plea and said stipulation being respectively:

(a) That the excessive hours of service involved in said third, fourth, and fifth counts were the result of a casualty or unavoidable accident or the act of God; and were also the result of a cause or causes not known to petitioner or its officer or agent in charge of the crew of said train at the time

said crew left a terminal, to wit, Las Vegas, and which could not have been foreseen.

(*b*) That the excessive hours complained of having been those which resulted directly from and in consequence of one or more of the causes enumerated in "(*a*)," your petitioner was not guilty as charged, as, under the terms of the first proviso to section 3 of said act of Congress, the existence of any one or more of said causes removed the application of said act.

(*c*) That the proof showed conclusively (and the trial and appellate courts found affirmatively) that the excessive hours incurred by the train crew of petitioner's passenger train No. 1 were the result of causes which could not have been foreseen or guarded against by your petitioner or its officer or agent in charge of said employees; and that said happenings involved no neglect or lack of precaution on the part of your petitioner or its officers or agents.

(*d*) That under the provisions of section 3 of said act of Congress, as interpreted by the Interstate Commerce Commission and embodied in ruling No. 88 of its Administrative Rulings, adopted and published June 25, 1908, said crew, the train in whose charge, to wit, train No. 1, had been overtaken by casualty or unavoidable accident or the act of God, was lawfully authorized to remain on duty until said train reached its terminal or end of the run, to wit, Los Angeles, California.

(*e*) That said train crew was, pursuant to and in reliance upon said Administrative Ruling No. 88, permitted to remain on duty with said train until it reached its terminal or end of its run, to wit, Los Angeles, California.

(*f*) That a casualty or unavoidable accident having happened within the purview of the first proviso of section 3 of said act, the provisions of said act did not apply to said crew, or any member thereof, while so on duty with said train.

(*g*) That your petitioner was unable to relieve said crew

at either Daggett or San Bernardino, neither of said points being a terminal or relay station for trains of the class of your petitioner's train No. 1.

(h) That your petitioner had no means of relieving the crew of said train at Daggett or San Bernardino, except by sending a relief crew from Los Angeles for that purpose, which, it submits, it was not required to do under any interpretation of the provisions of the proviso to section 3 of said act, nor under the provisions of said proviso as interpreted by the Interstate Commerce Commission, as embodied in its Administrative Ruling No. 88, adopted and published June 25, 1908, within four months after the act took effect, reading:

> "Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted [first proviso to section 3] removes the application of the law to that trip."

(i) That said ruling No. 88, and the construction embodied therein, were reported to Congress by said Commission in 1908, 1909, 1910, 1911, and 1912, and were accepted and adopted by Congress as the true construction of said proviso, for that Congress never changed or amended said proviso.

The defenses interposed to the third, fourth, and fifth counts aforesaid were those also interposed to the sixth, seventh, and eight counts aforesaid, relating to passenger train No. 7 of your petitioner.

V.

The facts of the case, as adduced at the trial—practically undisputed, though suggesting inferences—and upon which the special defenses of your petitioner are reared, consist of (1) agreed facts (Tr., pp. 82-90, incl.); (2) oral testimony of Carl P. Smith, an employee of your petitioner, a witness

called in behalf of plaintiff (Tr., pp. 91-110, incl.), and (3) certain "Conference Rulings of the Interstate Commerce Commission on the Hours of Service Law"—the act of Congress involved herein—(Tr., pp. 117-27, incl.), and which facts, in relation to your petitioner's train No. 1, covered by the third, fourth, and fifth counts of the complaint in case No. 243, Civil, are, in substance, as follows:

On October 3d, 1912, your petitioner's regularly scheduled westbound passenger train No. 1, running between Salt Lake City, Utah, and Los Angeles, California, arrived at Las Vegas, Nevada, a regularly established relay terminal of your petitioner, where its passenger train crews, both engine and train, were relieved, at about 5:30 o'clock p. m., "on time." There the crews, both engine and train, of the train in question were relieved. The train left that point at 5:45 o'clock p. m., and its train crew consisted of a conductor and two brakemen—the persons named in said third, fourth, and fifth counts. Las Vegas, from which said train started, was a terminal (initial), and the next terminal (final) for that train was Los Angeles, and the crew of that train ran regularly from Las Vegas to Los Angeles—Las Vegas was the *beginning* and Los Angeles was the *end* of that run or trip. The crew of that train remained with it from the time it left Las Vegas, at 5:45 o'clock p. m. on the 3d of October, until it arrived at Los Angeles at 8:00 o'clock p. m. on the 4th, said crew having been on duty substantially 27 continuous hours.

Los Angeles was distant from Las Vegas about 334 miles. The "running time" of said train between said terminii was 13½ hours, and the average rate of speed for the entire run was about 25 miles an hour.

After said train left Las Vegas, a heavy landslide occurred on your petitioner's line of road at a point west of Las Vegas, between Crucero Junction and Otis, which landslide completely disabled said line and put it out of commission. The landslide was due to heavy rains in the hills, severe

electrical storms and storm water running strongly in the waterways" (Tr., p. 98). The fact that the landslide had occurred was unknown to, and could not have been foreseen by your petitioner or its officer or agent in charge of said crew, at the time said crew left Las Vegas. Said landslide was a casualty or unavoidable accident, or an act of God, and which, in its results, was unparalleled on the line of your petitioner.

As a result of said landslide and consequent line disablement, your petitioner was compelled to detour its said train over the railroads respectively of the Tonopah & Tidewater Railroad Company and the Atchison, Topeka & Santa Fe Railway Company, over the former from Crucero to Ludlow, and over the latter from Ludlow to Daggett. In effecting the detour, numerous delays were encountered, all of them, however, justifiable, and none of which, or the fact that a detour would be necessary, were foreseen or foreseeable at the time said train left Las Vegas.

When the train in question reached Daggett, its crew had been on duty approximately 17 hours and 5 minutes, or one hour and 5 minutes in excess of sixteen hours.

The train dispatcher of your petitioner having the control and direction of said train while it was on your petitioner's own line did not know, and could not have known, because of trouble with telegraph wires as a result of weather conditions, when said train arrived at or departed from Ludlow, a station on the line of the Santa Fe (Tr., p. 93). He did, however, know of its arrival at Daggett, and also knew at that time that it was impossible for it to get to its terminal (Los Angeles) within the sixteen-hour period.

The line of railroad extending from Daggett on the east to Colton on the west was owned by, and in the exclusive control of, the Santa Fe, but over which, subject to the direction of the train dispatcher of that company, your petitioner, by contract with said company, enjoyed "running rights" for its trains and crews. That part of the line may, therefore, be termed a "joint line" for the movement of the trains

of your petitioner and of the Santa Fe Company, those of your petitioner being moved under the exclusive direction of the Santa Fe Company. Your petitioner had no voice or participation in the actual operation of that line, save as aforesaid, and its trains were moved over it solely under the direction of the train dispatcher of the Santa Fe Company.

Otis was a station on the line of your petitioner, approximately four miles east of Daggett. Otis was a terminal for the relief of freight crews, but not for passenger crews. Freight crews at Otis were qualified for passenger service, but all such crews, on the date in question, had been put in work train service and had gone to the scene of the landslide to make repairs to, and clear, the line.

Daggett was not a relay station for the relief of either train or engine crews.

San Bernardino was not a passenger-train-crew terminal for through trains of your petitioner. Two crews of local passenger trains at that time laid over at San Bernardino, but said crews were duly assigned to local trains. Each of these local passenger-train crews was composed of a conductor and one brakeman. The through passenger trains of your petitioner ran from San Bernardino to Colton Junction over said joint line, but the two local passenger trains with which the local crews heretofore referred to were connected ran from San Bernardino to Riverside Junction over the line of the Southern Pacific Company. Neither of the local crews could have been assigned to the relief of the crew of train No. 1, and, moreover, said local crews had only one brakeman each. Said local crews may have been familiar with Santa Fe rules, but, so far as the witness knew, they had never operated trains over that line.

Facts Relating to Train No. 7, Covered by the Sixth, Seventh, and Eighth Counts or Causes of Action.

Train No. 7, on October 4, 1912, was a limited passenger train. It left Las Vegas at 6:12 o'clock a. m. of that day, and arrived at Los Angeles, the end of that run, on the next succeeding day, the 5th, at 6:28 a. m., having been on the rails 24 hours and 16 minutes. Its crew, which began and continued with it until the end of the run, were those mentioned in the sixth, seventh, and eighth counts. They went on duty at Las Vegas, the initial terminal point, at 5:30 o'clock a. m. on the 4th, and remained on duty with the train until relieved at Los Angeles at 6:28 o'clock a. m. on the 5th, having been on duty for a continuous period of substantially 25 hours.

The schedule running time of this train between Las Vegas and Los Angeles was 11 hours and 28 minutes. Like train No. 1, embraced in the third, fourth, and fifth counts, and for the same reason, it was compelled to detour via the lines respectively of the Tonopah & Tidewater and the Santa Fe companies, between Crucero Junction, a point on the former, and Ludlow, a point on the latter, and thence on the rails of the latter to Daggett. It arrived at Daggett at 2:50 p. m., and departed therefrom at 3:35 p. m. on the 4th, and reached San Bernardino at 3:34 a. m. on the 5th—7 hours and 3 minutes after the expiration of the 16-hour period.

Arriving at Daggett, the train crew had been out of Las Vegas, counting from the time they had reported for duty, 9 hours and 20 minutes, and, but for the delays subsequently encountered, should have reached Los Angeles, the end of that run, within the 16-hour period, the schedule running time between Daggett and Los Angeles being 5 hours and 35 minutes, and which, added to the 9 hours and 20 minutes, made a total period of 14 hours and 55 minutes, or 1 hour and 5 minutes less than the 16 hours; so that

had there been no delay encountered after No. 7 left Daggett, it would have arrived at Los Angeles within the 16-hour period (Tr., p. 98).

(None of the delays attending the movement of this train between Las Vegas and Daggett were questioned by counsel for plaintiff, or by the trial or appellate courts; indeed, it appears to have been conceded that all delays prior to reaching Daggett were those in every instance excusable and beyond the power of your petitioner to prevent. The detour was accomplished as rapidly as circumstances permitted, and the reason for the detour was the disablement of your petitioner's line, due to the landslide of the previous day, already referred to in connection with the third, fourth, and fifth counts.)

After train No. 7 left Daggett it encountered certain serious delays, none of which could have been foreseen when the train left Daggett by your petitioner, or any of its officers or agents in charge of said crew, namely: a delay of 24 minutes between Barstow and Victorville, due to a heavy wind storm; a further delay of 8 hours and 18 minutes at Hesperia, by reason of the main line of the Santa Fe joint track being blocked at Lugo, by the derailment of a Santa Fe freight train, caused by a car breaking in two while being pulled into a siding, thereby blocking the main line; and a further delay of 10 minutes at Lugo, where the derailment occurred, by reason of the main line being blocked by the wrecking outfit having in tow the derailed car, compelling train No. 7 to run onto a siding and back out again in order to get by it (Tr., p. 98 *et seq.*), the delays referred to aggregating 8 hours and 52 minutes.

The special defenses tendered by your petitioner with respect to the third, fourth, and fifth counts, or causes of action, were those likewise interposed by it to the sixth, seventh, and eighth counts, or causes of action, and need not be restated.

VI.

On October 6, 1913, said consolidated cause came on regularly for trial before the Honorable Olin Wellborn, United States district judge for the Southern District of California, Southern Division, and a jury of twelve men duly empaneled and sworn therein; and the trial having been proceeded with on the 6th, 7th, and 8th days of October, 1913, and a witness having been sworn and examined, and the stipulation of facts having been read in evidence, and certain documentary evidence having been introduced, and the evidence having been closed, and your petitioner having stated and argued its special defenses accruing to it under said stipulation, and counsel for both parties having argued said cause, the court, upon motion of counsel for plaintiff and over the objection and exception of your petitioner, instructed the jury as follows:

> "In the two cases, gentlemen of the jury, of the United States of America against San Pedro, Los Angeles & Salt Lake Railroad Company—one of them is numbered 106 and the other 243—which, by reason of their consolidation, have been tried together, the facts are agreed upon. There is no controversy but that in all of the cases mentioned in the complaint—both complaints—the employees named in each count were permitted to remain on service for periods longer than those allowed by the statute. In each case the defendant has sought to justify the detention or the allowing of these employees to remain on service. The facts are agreed upon, and hence it is a matter of law for the court to determine. And upon these agreed facts I shall hold, and do hold, as matter of law, that none of the defenses to the causes of action, except the fourth cause of action to complaint number 106, are good. The court therefore instructs you—and it is your duty to obey the instructions of the court—to find in favor of the plaintiff on each count of the complaint in each case, except the fourth count or the fourth cause of action

in the complaint in case 106, and on that cause of action you will return a verdict in favor of the defendant. Submit the form of verdict to the jury, and let one of your number be selected as foreman and let him sign the verdict" (Tr., p. 128).

Thereupon the jury, on said 8th day of October, 1913, returned a verdict in accordance with said instruction, finding for the plaintiff on each count in complaint No. 106, except the fourth count thereof, and upon which there was a finding for defendant and finding for plaintiff on each of the 22 counts in complaint No. 243. Thereupon, following the rendition of said verdict, the honorable district judge pronounced judgment that the defendant, your petitioner, pay a penalty of $100 on each of the following causes of action in case No. 243, Civil, to wit, causes of action numbers 1 and 2 and numbers 9 to 22, both inclusive; and a penalty of $150 on each of the following causes of action in case No. 243, Civil, to wit, numbers 3 to 8, inclusive, and a penalty of $150 on each the 1st, 2d, and 3d causes of action in case No. 106, Civil.

VII.

The trial judge not having filed or announced any opinion precedent to or after giving said instruction, it is impossible to state the conclusion at which he arrived, except as it is reflected in said instruction.

VIII.

On October 10, 1913, judgment on said verdict was entered in said consolidated cause in favor of the plaintiff and against defendant, your petitioner, for the sum of $2,950 (including the counts or causes of action herein sought to be reviewed) and for costs of suit.

IX.

An order having been duly entered on December 29, 1913, denying your petitioner a new trial, your petitioner, on March 31, 1914, in said district court, in said consolidated case, filed its petition for, and on April 2, 1914, was allowed, a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to have said verdict of the jury and said judgment thereon reviewed; and also, on said last-named date, upon the petition of your petitioner therefor, together with an assignment of errors filed within due time, the said honorable district judge made an order in said consolidated cause suspending and staying further proceedings thereon until the determination of said error proceedings by said United States Circuit Court of Appeals, upon your petitioner filing with the clerk of said district court a good and sufficient undertaking in the sum of six thousand dollars, to answer all costs and damages in case your petitioner should fail to prosecute its said writ of error with effect or make good its plea; said bond to be approved by the clerk of said court, and which said bond, conditioned as aforesaid, was on the same day duly approved and filed, and has ever since been, and still is, in full force and effect.

X.

On April 23, 1914, your petitioner perfected its error proceedings in said United States Circuit Court of Appeals for the Ninth Circuit, and duly filed on said date a duly certified transcript of the record and of all proceedings in said consolidated cause, and on the 6th day of October, 1914, said case was argued.

That thereafter, on or about the 1st day of February, 1915, the said United States Circuit Court of Appeals for the Ninth Circuit rendered and filed an opinion affirming in part and reversing in part the judgment before it for review; that is

to say, affirming the judgment of the trial court with respect to the third, fourth, and fifth causes of action in respect to passenger train No. 1, and the sixth, seventh, and eighth causes of action in respect to passenger train No. 7, and which opinion and decision, among other things, held that, while under the evidence there was no doubt that the landslide was the direct and necessary cause of the detours of trains Nos. 1 and 7 (the former covered by the third, fourth, and fifth counts, and the latter by the sixth, seventh, and eighth counts of the complaint in case No. 243) and of numerous delays to said trains, and that your petitioner was entirely justified in continuing in service the train crews of each train up to the time it could, with the exercise of proper diligence, have relieved them; that it had such opportunity, by due diligence, to relieve them at *Daggett* or San Bernardino or both, and was by the hours of service act, properly construed, required to avail itself of such opportunity, and not having done so, was properly convicted; and affirmed the judgment and verdict upon each and all of said counts, thereby utterly disregarding and refusing to consider and give effect to the contemporaneous construction of the Interstate Commerce Commission of the first proviso to the third section of said hours of service act, promulgated June 25, 1908, in which that body held and declared "(*b*)" [referring to said proviso], *"Any employee so delayed may therefore continue on duty* TO THE TERMINAL OR END OF THAT RUN. *The proviso quoted removes the application of the law to that trip."*

The court in its said opinion and decision further held in effect that admitting that under the evidence there was no doubt that the landslide was the direct and necessary cause of the detour of the train and of its numerous delays, and that your petitioner was justified in continuing in service its train crew up to the time it could, with the exercise of proper diligence, have relieved it, and that it had such opportunity at San Bernardino or Daggett or both, and was by the stat-

ute, properly construed, required to avail itself of such opportunity; thereby holding, in effect, that the act required petitioner to have had relief crews at either San Bernardino or Daggett or both; in other words, said decision and opinion held in effect that petitioner was bound to ship relief crews from any place where such crews were to be had to either of the points named to relieve the crew of the train in question, notwithstanding that the evidence showing indisputably that petitioner did not maintain any terminal or relief crews at Daggett, and that San Bernardino was not a terminal or relay station for the relief of crews of trains of the class of the train in question. The evidence further showed that Otis, a point substantially four miles east of Daggett, was a terminal or relay point for the relief of crews of through passenger trains, but that such crews at that time were not available, having been sent out to the scene of the landslide to help clear up the line. The undisputed testimony is also that the train dispatchers of petitioner did not know and could not have known of the arrival of said train at Ludlow, nor until it actually entered upon the "joint line" at Daggett.

Los Angeles is distant from Daggett 159 miles; San Bernardino is distant from Daggett 91 miles, and San Bernardino is distant from Los Angeles 68 miles. Under the evidence Los Angeles was the only point where relief crews at that time could have been obtained, and in order to have relieved the crew of said train at San Bernardino, the only point where it was possible to relieve it, it would have been necessary to have sent a special train for that purpose. Therefore petitioner was not negligent in not relieving said crew unless it was bound, at its peril, to have shipped a relief crew from Los Angeles to relieve the crew of said train at San Bernardino.

The court in said decision and opinion further stated that "in support of that contention"—(that it was the intention of Congress to permit a crew starting from a terminal to re-

main with a train overtaken by delay, casualty or unavoidable accident until the end of the run)—"counsel earnestly rely upon ruling 88 of the Interstate Commerce Commission, made May 25, 1908 (June 25, 1908), which, after quoting the first proviso of section 3 of the act, reads: "Any employee so delayed may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip." That ruling must be read and considered in connection with the preceding ruling of the Commission made March 16, 1908, which reads as follows:

> "287 (*i*) SEC. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point;"

and must also be read in connection with the action of the Commission shown by the record in this case, that the suit was directed to be brought by the attorney general at the request of the Interstate Commerce Commission. But over and above that, it is the obvious duty of the court to give effect to that it conceives to be the true construction of the act of Congress."

It is to be affirmed of ruling 287, *supra*, that it was promulgated March 16, 1908, and, therefore, was antecedent to ruling 88, and in so far as it is inconsistent with the latter ruling, following the analogy employed in the construction of statutes, it must bow to the later ruling. But over and above all this, the earlier ruling (287) was repudiated by the Commission itself, for, in its report to Congress for the year 1908 and subsequent years, it failed to incorporate said ruling 287, reporting only ruling No. 88.

XI.

On the 3rd day of March, 1915, and within the time prescribed by the rules of said Circuit Court of Appeals, your petitioner filed with the clerk of said court its petition for a rehearing in said entitled cause, which said petition was, on the 8th day of March, 1915, denied.

XII.

That the said Circuit Court of Appeals, by its several orders, stayed the issuance of its mandate until November 17, 1915, and that writ of error was allowed prior to said final date.

XIII.

The questions and propositions of law involved herein are substantially as follows:

1. The Circuit Court of Appeals having found and adjudged the landslide as having been the direct and necessary cause of the detour of trains Nos. 1 and 7, and of the numerous delays encountered by said trains intermediate Las Vegas and Daggett, and that all such delays were justifiable, was your petitioner justified in requiring and permitting the crews of said trains to remain on duty in connection therewith after their arrival at Daggett and until said trains reached their final terminal, Los Angeles?

In other words, given the proposition—the fact—that your petitioner maintained no relay station for the relief of through passenger train crews, or relief crews of any kind, at Daggett or San Bernardino, was it required, under said act, to transport relief crews from Los Angeles, the final terminal of said trains, and confessedly the only source of relief, to either San Bernardino or Daggett, to relieve the crews of said trains Nos. 1 and 7?

2. If it was not possible to provide and ship crews from Los Angeles to either Daggett or San Bernardino to relieve the crews of said trains, was your petitioner, in order to yield obedience to said act, bound to abandon its said trains until such relief could be provided?

3. Did your petitioner have the right to rely upon, and was its conduct in permitting said crews to remain on duty in connection with said trains to the terminal or *end of their run* shielded by the contemporaneous construction given by the Interstate Commerce Commission to the first proviso of section three of said act, embodied in subdivision "(*b*)" of rule "88" of the "Conference Rulings on the Hours of Service Law by the Commission," declared and promulgated June 25, 1908 (within four months after the act took effect), providing (Tr., pp. 121-2):

> "(*b*) Section 3 of the law provides that: 'The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.'
>
> "**Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip.**"

That said ruling No. 88 of the Interstate Commerce Commission, embodying and declaring its interpretation and construction of said proviso, was in full force and effect during the times respectively mentioned in said third, fourth, fifth, sixth, seventh, and eighth causes of action, and had never been from the time it was promulgated, to-wit: June 25, 1908, superseded, altered, amended, modified or repealed, in whole or in part.

That from the time of the promulgation of said ruling

No. 88 thenceforward continuously up to the time of the commencement of this action, to-wit: for a continuous period of more than four years, said ruling No. 88, and the construction of said proviso embodied therein, had been accepted by your petitioner and uniformly adhered to and relied upon by it as the contemporaneous construction of the body called upon to act under the express provisions of the law and therein appointed to carry its provisions into effect; and said ruling No. 88, and the construction embodied therein, became a rule of conduct for your petitioner and its employees connected with the movements of your petitioner's trains and vehicles of transportation engaged in interstate traffic, and to which ruling it and they at all times, when circumstances invoked its application, in good faith and in full reliance upon it conformed their acts and conduct.

4. In view of the fact that the language of said proviso is doubtful, ambiguous, uncertain and obscure, and that intelligent and fair minds have differed, and do differ, upon the construction to be given it, should not said ruling No. 88 have protected the acts of your petitioner validly performed in contemplation of and in strict obedience to it?

5. Do not the words of the proviso: *"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God,"* operate to foil the act in case of casualty, unavoidable accident or the act of God?

6. Do not the words of the proviso: *"nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen,"* by necessary implication authorize the carrier to permit a crew so overtaken by such delay after leaving a terminal to remain on duty until the end of the run?

7. The opinion of the Circuit Court of Appeals concedes that when the crews of trains Nos. 1 and 7 reached Daggett, although at that time the crew of train No. 1 had been on

duty for a continuous period of more than sixteen hours, such crews had not been subject to the act. If up to that time the crews had not been subject to the act, when, as to such crews, did the act begin to apply? Did it begin to apply when those crews left Daggett?

8. The opinion and decision of the Circuit Court of Appeals to the extent that it held for naught and overturned the administrative ruling of the Commission, necessarily had the effect of depriving your petitioner of vested rights in its property, as by subjecting your petitioner to the imposition of fines and penalties for doing that which the construction adopted by the Commission declared might lawfully be done.

9. The Circuit Court of Appeals, your petitioner submits, in view of the ambiguous character of said proviso, and the penalties denounced by the act itself, should have favored instead of rejected the contemporaneous construction of said proviso by the Interstate Commerce Commission.

10. The word "terminal" occurring in said proviso has no reference to, nor connection with, the words "casualty or unavoidable accident or the act of God." That word has reference only to such delays as are the result of a cause, etc., occurring after an employee has left a terminal. The last part of said proviso, beginning with the words "nor where the delay," etc., refers only to train employees, while the other part of the proviso refers to all employees subject to the act.

11. On or about December 24, 1908, the Interstate Commerce Commission, pursuant to the requirements of law, transmitted to the Congress of the United States its 22d annual report, and at pages 49 and 50 thereof submitted to said legislative body the interpretation of said Commission embodied in its said ruling No. 88. Said Commission did not incorporate in its said report its ruling No. 287, of March 16, 1908, referred to on page 13 of the opinion of the Circuit Court of Appeals in this case; nor did said Commission, in any subsequent report to said legislative body,

make any reference to said administrative ruling No. 287. Wherefore, and by reason whereof, your petitioner states that by necessary inference, Congress acquiesced in and accepted said interpretation and construction of said Commission embodied in its said ruling No. 88, dated June 25, 1908, since Congress has never at any time changed or amended said proviso by due enactment of law, notwithstanding that said Commission has frequently, in its annual reports since 1908, recommended that Congress define and clarify the terms of the proviso to said section 3, to the end that the excepted causes—and those causes only—should be held to warrant excess service (Annual Report, 1908, p. 95).

12. Did not the Congress, in employing the word "terminal" in said proviso, have in mind that term as understood, defined and accepted by railroad men throughout the United States—a place which marks the beginning and end of the employees' run—the place at which, in the ordinary course of business, he would go on or off duty as a member of a crew to which he was assigned in connection with a particular train?

All of said questions were duly raised and argued by your petitioner in said District Court and in said Circuit Court of Appeals.

XIV.

The Circuit Court of Appeals said, in its opinion in this case, which is reported in volume 220 of the Federal Reporter, at page 737:

> "As under the evidence there can be no doubt that the landslide was the direct and necessary cause of the detour of the train in question and of its numerous delays, and that therefore the defendant company was entirely justified in continuing in service its train crew up to the time it could, with the exercise of proper diligence, have relieved it, it is plain that the action of the court below in directing a verdict for the plaintiff on counts 3, 4, and 5 must have been based

on the view that the defendant company had the opportunity to relieve that crew either at San Bernardino or Daggett, or both, and was, by the statute, properly construed, required to avail itself of it; in which view we think, for the reasons already stated, the court was right—being unable to agree with the learned counsel for the defendant company that by the adoption of the first proviso to the third section of the act 'it was the intention of Congress to permit a crew starting from a terminal to remain with the train overtaken by delay, casualty, or unavoidable accident, until the end of the run.'"

The Circuit Court of Appeals, further speaking in this case, said:

"But over and above that [referring to ruling 88 of the Interstate Commerce Commission, and to an antecedent ruling by the same body], it is the obvious duty of the court to give effect to what it conceives to be the true construction of the act of Congress."

In other words, notwithstanding that the Circuit Court of Appeals affirmatively found that a casualty or unavoidable accident had happened within the meaning of the first proviso of section 3 of said act, still your petitioner was not relieved from the operation of the act as by said proviso it is expressly provided.

XV.

In the case of *United States vs. Mo. Pac. Ry. Co.*, reported in volume 213, Federal Reporter, at page 169, the Circuit Court of Appeals for the Eighth Circuit, speaking through Mr. Justice Sanborn held, we submit, to the contrary, as is set forth by full reference to and quotation from said decision and opinion in the brief in support hereof.

XVI.

In the case of *United States vs. A., T. & S. F. Ry. Co.*, reported in vol. 212, Fed. Rep., at page 1000, the United States District Court of Arizona, interpreting said proviso, held (par. 2 of syllabus):

> "Hours of Service Law (act Congress, March 4, 1907, c. 2939, sec. 3, Stat. 1416, U. S. Comp. St. Supp. 1911, p. 1322) provides that the act shall not apply in any case of casualty or unavoidable accident or act of God, or where the delay is the result of a cause not known to the carrier, or its officer or agent in charge of the employee at the time he left a terminal and which could not have been foreseen. *Held*, that where a passenger train was delayed after the train crew had left their starting point, by the derailment of a freight train, resulting in the passenger crew being required to remain on duty more than 16 hours, the railroad company was not bound to tie up the train at the first stopping place where its crew could have been replaced, but was entitled, without incurring liability, to operate the train to the end of the passenger crew's run, the word 'terminal' as used in such section being synonymous with the 'end of the run' of the particular employee involved."

XVII.

And your petitioner further avers that the present case is one in which it is proper for this honorable court to issue a writ of certiorari, for the following reasons, among others:

1. Because, as indicated by said decisions, there is conflict between the Circuit Court of Appeals for the Ninth Circuit and the Circuit Court of Appeals for the Eighth Circuit touching the true interpretation to be accorded to said proviso.

2. Because the Circuit Court of Appeals in the present case held that your petitioner should have relieved the crews

of said trains at Daggett or San Bernardino, or both, despite the fact that in continuing said crews in service to the final terminal or end of the run your petitioner was but yielding obedience to said act, as interpreted by said Interstate Commerce Commission.

3. Because the decision and opinion of the Circuit Court of Appeals in this case is in conflict with the views expressed in the opinion of the district court in the case of *United States of America vs. Atchison, Topeka & Santa Fe Railway Company*, reported in vol. 212, Federal Reporter, at page 1000, which opinion, your petitioner respectfully submits, correctly reflects the proper construction of said proviso.

4. Because the questions of law involved herein have not been passed upon by this honorable court.

5. Because the public interests, and the interests of jurisprudence, require the decision of this honorable court upon the questions of law involved herein.

6. Because, in view of the mountainous and desert character of the country traversed by the lines of railroad of your petitioner, and other carriers, said questions are of sufficient general and material importance and interest as to make it necessary that they should be examined by the court of last resort.

Wherefore your petitioner prays that this honorable court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Ninth Circuit to bring up this case to this honorable court for such proceedings therein as to this honorable court may seem just.

ALEX. BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, ss:

Evans Browne, being first duly sworn according to law, deposes and says:

That he is the attorney of San Pedro, Los Angeles and Salt Lake Railroad Company, a corporation, the petitioner named in the foregoing petition, and as such makes this affidavit on behalf of said petitioner; that the same is true to his knowledge, information, and belief, which said knowledge, information, and belief is derived from the record in the case.

EVANS BROWNE.

Subscribed and sworn to before me this 29th day of November, 1915.

[L. S.] CHESTER R. SMITH,
Notary Public.

We hereby certify that we have examined the foregoing petition, and in our opinion such is well founded and the case is one in which the prayer of the petitioner should be granted by this honorable court.

ALEX. BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for Petitioner.

FILED
NOV 29 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted]248

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD CO., A CORPORATION,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

ALEX. BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for Petitioner.

INDEX.

	Page
Preface	1
Statement of facts	2
Inferences and deductions from testimony	3
Hours of service act	4
Rulings of Interstate Commerce Commission	7
"Ruling B" in full force	8
Analysis and effect of rulings A and B	9
"Ruling B"	10
Argument	12
Effect of contemporaneous construction	13
Proviso to section 3	17

TABLE OF CASES.

Browne *vs.* United States, 113 U. S., 568	14
Cyc., Vol. 36, p. 1139 *et seq*	14
In re Board of Street Opening and Improvement, 12 Misc. Rep., 562; 33 N. Y. Supp., 594	16
In re 136th Street, 33 N. Y. Supp., 594	16
Pennoyers *vs.* McConnaughty, 140 U. S., 1	14
The Enterprise, 8 Fed. Cas., 732; case No. 4499	17
Traders' National Bank *vs.* Lawrence Mfg. Co., 96 N. C., 298	20
United States *vs.* Bell, 182 Fed., 165	16
United States *vs.* Caracedo, etc., 209 U. S., 337	17
United States *vs.* Dickson *et al.*, 15 Peters, 162	18
United States *vs.* Distilled Spirits, 27 Fed. Cas., 332; case No. 15900	13
United States *vs.* Moore, 95 U. S., 760	14
United States *vs.* Mo. Pac. R. R. Co., 213 Fed., 169	21

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 716.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD CO., A CORPORATION,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The case which it is here sought to have reviewed involves the interpretation and construction of the *Hours of Service Law of Congress*, and the questions presented are now presented to this court for the *first* time.

The effect of the judgment of affirmance in this case, if it be allowed to stand, will be manifold:

(1.) It will sweep away a ruling made by the Interstate Commerce Commission, the body expressly charged with the enforcement of the law, made on June 25, 1908—a date substantially coincident with the date on which the law took

effect—embodying the construction by that body placed upon the first proviso to section 3 of the law.

(2.) It will transmute an act declared by the Interstate Commerce Commission to be *lawful* at the time it was done into an offense *after* it was done.

(3.) It will make an act which was not clearly an offense by the expressed will of the legislative body *when* it was done an offense by construction *after* it was done.

(4.) It substitutes, in a doubtful case, the construction of the court for that of the body appointed by the law itself to carry its provisions into effect.

(5.) It will be to declare, in effect, that the Interstate Commerce Commission was without warrant in attempting to construe the law, although construction was essential to its intelligent enforcement.

(6.) It will be, in effect, a judicial declaration that no longer may a carrier subject to any law within the competency of the Interstate Commerce Commission to enforce safely rely upon any interpretation it may attempt.

Statement of Facts.

This is a suit to recover penalties denounced by the Hours of Service Law. The members of each of two passenger-train crews are those involved in the complaint. We challenge and seek to have reviewed only so much and such part of the judgment of affirmance of the Circuit Court of Appeals as deals with each the third, fourth, fifth, sixth, seventh, and eighth counts or causes of action set forth in complaint No. 243, Civil.

The averments relating to those crews are set forth in substantial detail in the petition for a writ of certiorari, and need not be here repeated.

Each of the trains in question was delayed by one or more of the causes enumerated in the first proviso to section 3 of the act—delays beyond the power of petitioner to prevent. That much appears to be conceded by counsel for the Gov-

ernment, and are so found by the trial court and the Circuit Court of Appeals, it being stated in the opinion of the Circuit Court of Appeals, after holding that the train (both trains) was delayed—justifiably delayed—in consequence of one or more of the causes enumerated in the proviso to section 3 of the act, the Circuit Court of Appeals held, in brief, that the train crews, after these delays, should have been relieved either at Daggett or San Bernardino.

Inferences and Deductions from the Testimony.

That Daggett was not a station or terminal of petitioner; that it maintained no relief crews there; that Otis, a terminal for freight crews, had no relief crews at the time, such crews having gone to the scene of the landslide to help clear the line; that San Bernardino was not a relay station for the relief of through passenger-train crews; that there were local crews resting at that point, but even had they been available, which they were not, being actually engaged with local trains, they were numerically insufficient to make up two crews.

And so, the question is suggested by necessary inference, Why was not a relief crew or crews dispatched from Los Angeles to San Bernardino or Daggett? The witness Smith answered this question by stating, in effect, that although petitioner knew when the train reached Daggett it could not make its terminal, Los Angeles, within the 16-hour limit, yet no effort was made to despatch a relief crew from Los Angeles to San Bernardino.

It seems superfluous to argue that it was possible to have sent a relief crew from Los Angeles to Daggett, even conceding the possibility of sending one to San Bernardino; for, as a matter of fact, the testimony shows that until the train reached Ludlow, a station a few miles east of Daggett (it having been detoured via the lines respectively of the Tonopah & Tidewater and of the Santa Fe companies), petitioner

had not been advised of its movements—it having made its way over foreign lines. To have furnished a relief crew at Daggett meant the abandonment of the train at that point, to await a relief crew from Los Angeles, 158 miles away—a wait of about 6 hours, determined by the running schedule of train No. 1.

Conceivably, therefore, petitioner might have—could have—relieved the crew at San Bernardino, the first available point, by one sent from Los Angeles, a distance of 68.2 miles, and consuming about 2 hours and 20 minutes of actual running time; and the question is squarely presented whether it was bound to do so? Did its failure to do so involve a neglect or lack of precaution, such as should expose it to the penalties denounced by the act as and for a disobedience of its provisions?

The Circuit Court of Appeals has answered this question in the *affirmative* and the Interstate Commerce Commission in the *negative*. Both decisions cannot be right; one must stand and the other fall. And which must stand? That one which is harshest to the citizen to whom it is applied or that other one, less severe, in which petitioner was led to trust and to which it conformed its conduct?

It is next in order to refer to the provisions of the law itself applicable to this controversy.

Hours of Service Act.

Section 2 of the act of Congress entitled "An Act to Promote the Safety of Employees and Travelers Upon Railroads by Limiting the Hours of Service of Employees Thereon," approved March 4, 1907, provides:

> "SECTION 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been

continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty;

"*Provided,* That no operator, train dispatcher, or other employee, who by the use of the telegraph or telephone, dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine consecutive hours in any twenty-four-hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period of not exceeding three days in any week;

"*Provided, further,* The Interstate Commerce Commission may, after full hearing in a particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case."

Section 3 provides as follows:

"That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him, but no such suit shall be

brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents;

"**Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left the terminal, and which could not have been foreseen;**

"*Provided, further,* That the provisions of this act shall not apply to the crews of wrecking or relief trains."

Section 4 provides as follows:

"It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act."

Section 5 provides as follows:

"That this act shall take effect and be in force one year after its passage."

Reduced to its simplest terms, the act provides:

(Sec. 2.) Unlawful for the carrier to require or permit its employees on trains to be and remain on duty for a longer period than 16 consecutive hours.

(Sec. 3, proviso.) The application of the act is removed in any case of casualty or unavoidable accident or the act of God; and also where the delay was the result of a cause not known * * * at the time the employee left a terminal, and which could not have been foreseen.

(Sec. 4.) The duty of enforcing the law is expressly confided to the Interstate Commerce Commission.

(Sec. 5.) The act becomes effective one year *after* its passage.

Rulings of the Interstate Commerce Commission Referred to Herein and Mentioned in the Evidence and in the Decision of the Circuit Court of Appeals.

On March 16, 1908—12 days after the law by its terms took effect—the Interstate Commerce Commission adopted and published its Ruling No. 287 (hereinafter referred to as "Ruling A") reading:

> "The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees so delayed, reach a terminal or relay point."

On June 25, 1908—substantially three months after the effective date of the act—the Interstate Commerce Commission adopted and published its "Ruling No. 88" (hereinafter referred to as "Ruling B"), reading:

> "The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.
>
> "Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

It thus appears that the two rulings, made only a few months apart, were so made substantially coincidently with the effective date of the act. Each of these rulings is denom-

inated by the Commission itself as CONFERENCE OR ADMINISTRATIVE RULINGS ON THE HOURS OF SERVICE LAW BY THE COMMISSION.

"Ruling B" Was in Full Force and Effect During the Times Trains Nos. 1 and 7 Were Overtaken by Casualty.

The only notice given by the Commission that it had renounced and nullified "Ruling B" was by the service of the complaint and summons in this action. Naturally enough, the Commission had the right to correct any ruling made by it upon becoming convinced it was wrong; but only in the same formal manner which attended the publication of the original ruling.

We therefore say:

1. That "Ruling B" was in full force and effect, and obligatory, during all the times mentioned in the third, fourth, fifth, sixth, seventh, and eighth causes of action of the complaint, and a complete defense thereto.

2. That "Ruling B" had never been from the time of its adoption and publication suspended, altered, annulled, modified or repealed, in whole or in part.

3. That from the time of the adoption and publication of "Ruling B," and thence forward continuously up to the time of the commencement of this suit—a continuous period of upwards of four years—"Ruling B" and the construction embodied therein, had been accepted and uniformly relied upon and adhered to by petitioner as the contemporaneous construction of the body called upon to act under the express provisions of the law, and thereunder bound to carry its provisions into effect; and said "Ruling B" and the construction embodied therein became and was a rule of conduct for petitioner and its employees connected with the movement of its trains and vehicles engaged in interstate traffic, and to which ruling it and they at all times, when circumstances invoked its application, in good faith and in full reliance upon it, conformed their acts and conduct; and it and they

did so conform their acts and conduct in respect to the circumstances involved in the counts covered by the judgment of affirmance in this case; and having so relied upon and adhered to said ruling, petitioner's acts in the premises were shielded and protected thereby.

"Ruling B" was raised by the pleadings and evidence, and fully considered by the trial court and by the Circuit Court of Appeals.

Analysis and Effect of the Two Rulings A and B.

What can be plainer than what the Commission attempted by "Ruling A" was to define the meaning of the causes specified in the first proviso to section 3 of the act, which, when one of them existed, removed its application.

Strictly, "Ruling A" added nothing to the sense or meaning of the proviso. The only thing accomplished by it was to interpolate the word "unavoidable" before the word "casualty," and thereby put "casualty" in the category of unavoidable accidents. The term found in the proviso really required no exposition, being those well understood in law. But, the Commission did not stop with definition; it went farther and interpreted the proviso to mean—interpolating therein apt words for that purpose—

> "When any of the occurrences as herein defined shall exist, the application of the act will be removed in respect to employees on trains *only until such employees so delayed shall reach a terminal or relay point.*"

The interpretation thus attempted was an effort to fix the time or place at which the law, whenever justifiably suspended by any of the causes specified in the proviso, should be restored to its vigor; and such time or place *a terminal or relay point.* Unfortunately, however, neither the word "terminal," nor the words "relay point" is defined. "Terminal," in railroad parlance, means "termination"—*"the end*

of the run." No difficulty exists with the terms "relay point," which is a place of rest or relief; in railroad parlance, a point established for the relief of train or engine crews, or both. The presumption, we believe, will be indulged that the Commission was speaking in terms of railroads, and thus understood, the implied command was that the employee delayed in excess of sixteen hours' continuous work, must be relieved at the first "relay point" established by the carrier in the usual course for relieving crews of a particular class. The Commission knew, doubtless, that the carriers had, in order to conform to the act, established exclusive relay points for engine crews, for freight crews, for passenger crews, and for local as well as through passenger crews respectively, and nothing in the ruling indicates that the Commission intended or desired to disturb those arrangements.

"Ruling B."

"Ruling B" is so clear in its terms as to need no interpretation. After quoting the proviso, it declares:

> **"Any employee so delayed may thereafter continue to the terminal or end of the run. The proviso quoted removes the application of the law to that trip."**

No ambiguity exists here. The words employed are plain, simple, direct, and expressive, and leave us in no doubt as to their meaning. By it the *"terminal"* is fixed at the *"end of the run"* or *"trip."* "Run" and "trip" are used interchangeably, and each term serves to emphasize the other. And then, mark you, the Commission, the body charged with the enforcement of the law, solemnly declares:

> *"The proviso quoted removes the application of the law to that trip."*

But each, the Commission and the Circuit Court of Appeals, say that "Ruling B" must be read and considered in connection with the action of the Commission, shown by the

all the Circuit Court of Appeals says in regard to the two rulings, except that they must also be read and considered in connection with the action of the Commission, shown by the record in this case, that the suit was directed to be brought by the Attorney General at the request of the Interstate Commerce Commission.

To grant that the two rulings are in *pari materia* is not to disparage or weaken our contention. For, being in *pari materia*, they are, under well-settled rules of construction, to be construed together and effect given to each, if possible. If, however, they are conflicting and inconsistent, then, to the extent of the inconsistency, the *later* ruling must prevail.

Tested by this rule, what is the result? If it be insisted that the necessary effect of "Ruling A" was to require the carrier to relieve the crew at any point short of *the end of the run or trip*, certainly a reasonable construction, then to that extent at least it is in hopeless antagonism to "Ruling B," which declares that the employee may continue to *the end of the run or trip*.

Both rulings cannot stand; one must go, and that "Ruling A." That this conclusion is sound seems to require no argument.

ARGUMENT.

Noting that the language of the proviso, considered in relation to the other provisions of the act, is doubtful, ambiguous, uncertain, and obscure, and that intelligent and fair minds differ upon the true construction to be accorded to it, should not "Ruling B" have protected the acts of petitioner done within its purview and in reliance upon it?

"Ruling B" was adopted and published within four months after the act took effect and was, therefore, the contemporaneous construction of a statute by a body charged with its enforcement.

That construction, until it was modified, became, for petitioner, an integral part of the law, as though it had been incorporated into it, and now to declare that construction faulty in reference to an act done while the construction remained in effect, is to brand petitioner as a law-breaker, and incidentally deprive it of its property.

The Circuit Court of Appeals seems to have ignored "Ruling "B," for, after simply referring to the two rulings, the court in its opinion says:

> "But over and above that, it is the obvious duty of the court to give effect to what it considers to be the true construction of the act of Congress."

Of course, we understand that the announcement of the court's construction in effect condemned 'Ruling B" and in effect adopted "Ruling A." In this, we think, the court erred and should have upheld "Ruling B."

> "In construing a severe statute declaring a heavy forfeiture (and, according to one construction, claimed for small offenses), it is just to say that those who are called upon to conduct their business affairs in view of all its provisions, ought to be fairly ap-

prised of its requirements, and of its penalties, of whatever kind."

U. S. *vs.* Distilled Spirits, 27 Fed. Cas., 332; Case No. 15960.

"They are bound to know the law, but law-makers owe to them the duty to make the law intelligible; and those whose business it is to construe or expound a law which is of doubtful or double meaning, when it is obvious that *those* to whom it is to be applied may well have been led to trust in another which is less severe, but equally satisfying its terms. This is not saying that laws of the kind in question are to be strictly construed in favor of the subject and against the State, but only, that they should be construed with reasonable fairness to the citizen."

Ibid.

Contemporaneous Construction by the Body Charged with the Enforcement of a Law Should Not be Lightly Set Aside Unless it is Manifestly Erroneous.

"Primarily it is the function and duty of the courts to interpret the meaning of a statute, and where they can ascertain the legislative intent by the use of intrinsic aids alone, resort to its contemporaneous construction by other persons is both unnecessary and improper. But where the language of the statute itself is ambiguous or uncertain, the opinions entertained by contemporaries as to its meaning are frequently the best guides to the legislative intent."

"The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the Government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous.

"The consideration to be accorded executive construction is also especially weighty in the case of statutes prescribing penalties, or levying impositions, where the executive construction has been in favor

of the persons affected; or, in cases where the executive construction has been impliedly indorsed by the legislature.

"To the extent that a reversal of the executive construction would result in depriving persons affected of vested rights in property, or contract, the executive construction will be regarded *as conclusive.*"

36 Cyc., 1139-40-41, citing many cases.

And in Pennoyer *vs.* McConnaughy, 140 U. S., 1-25; 35 Law Ed., 363, the same principle is laid down, on page 370 of the latter:

"The principle that the contemporaneous construction of a statute by the executive officers of the Government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up, which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved, or unless the construction itself is manifestly incorrect."

In U. S. *vs.* Moore, 95 U. S., 760; 24 Law Ed., 588, decided 1878, the court say:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons (citing Edwards *vs.* Darby, 12 Wheat., 210; U. S. *vs.* Bk., 6 Pet., 29; U. S. *vs.* McDaniel, 7 Pet., 1).

"The officers concerned are usually able men, and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

And to the same effect is Brown *vs.* U. S., 113 U. S., 568-574; 28 Law Ed., 1080, as follows:

"It must be conceded that were the question a new one, the true construction of the section would be open to doubt. But the findings of the Court of Claims show that soon after the passage of the act the President and the Navy Department construed the section to include warrant as well as commissioned officers, and that they have since that time uniformly adhered to that construction, and that under its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform interpretation is entitled to weigh in the construction of the law, and in a case of doubt ought to turn the scale. In Edwards *vs.* Darby, 12 Wheat., 206, it was said by this court that 'in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to *carry its provisions into effect,* is entitled to great respect.' This case is cited upon this point with approval in Atkins *vs.* Disintegrating Co., 18 Wall., 301; 21 Law Ed., 844; Smythe *vs.* Fiske, 23 Wall., 382; 23 Law Ed., 49; U. S. *vs.* Pugh, 99 U. S., 265; 25 Law Ed., 322, and in U. S. *vs.* Moore, 95 U. S., 763; 24 Law Ed., 589. In the case last mentioned the court said that 'the construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called up to interpret.' And in the case of U. S. *vs.* Pugh, the court said: 'While, therefore, the question, "the construction of the abandoned property act," is one by no means free from doubt, we are not inclined to interfere at this late day with a rule which has been acted upon by the Court of Claims and the Executive for so long a time' (citing cases).

"These authorities justify us in adhering to the construction of the law adopted by the executive department of the Government, and are conclusive against the contention of appellant that section 23 did not apply to warrant officers.

"Where the proper interpretation to be given a statute is a matter of doubt, the practical construc-

tion which it has received from those charged with its execution will prevail."

In re Board of Street Opening and Improvement, 12 Misc. Rep., 526; 33 N. Y. Supp., 594.

In re 136th St., *id.*

U. S. *vs.* Bellm, 182 Fed., 165, citing U. S. *vs.* Ala. R. R. Co., 142 U. S., 616; 35 Law Ed., 1134.

In the latter case, at page 1136, the court say:

"We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years through six different administrations of that department a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case,—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government. These principles were announced as early as 1827 in Edwards *vs.* Darby, 25 U. S., 12 Wheat., 206-210, and have been steadily adhered to in subsequent decisions. U. S. *vs.* State Bank North Carolina, 31 U. S., 6 Pet., 29, 39; U. S. *vs.* Macdaniel, 32 U. S., 7 Pet., 1; Brown *vs.* U. S., 113 U. S., 568; U. S. *vs.* Moore, 95 U. S., 760, 765." (See also Baker *vs.* Swigart, 199 Fed., 867.)

In this last case this court, speaking through his honor Judge Ross, said:

> "The first thing to do in such a case is to see just what the lawmaking power has enacted. If the provisions of the statute are plain and unambiguous, the courts must accept the law as there declared; otherwise they would usurp the function of the legislative department of the Government. Of course, if the provisions of the statute in question be uncertain, conflicting, or ambiguous, they become the proper subject for construction, which is a function of the court, in which event and in aid thereof resort may be had to any construction put upon it * * * by that department of the Government charged with the execution of the law."
>
> "Where there is such an ambiguity in a penal statute as to leave reasonable doubt of its meaning, it is the duty of a court not to inflict the penalty."
>
> The Enterprise, 8 Fed. Cas., 732; Case No. 4499.

In U. S. *vs.* Carecedo, etc., 209 U. S., 337-339; 52 Law Ed., 821, the court say:

> "We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution. Robertson *vs.* Downing, 127 U. S., 607; 32 Law Ed., 269; U. S. *vs.* Healey, 160 U. S., 136; 40 Law Ed., 369. Judgment reversed."

The Proviso to Section 3.

The proviso reads:

> **"That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent**

> **in charge of such employee at the time said employee left a terminal and which could not have been foreseen."**

The Circuit Court of Appeals, in construing this proviso adverted to, and applied the rule laid down by Mr. Justice Story in United States *vs.* Dickson *et al.*, 15 Peters, 162, viz:

> "The general rule of law which has prevailed, and became consecrated almost as a maxim in the interpretation of a statute, (is) that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions out of the enacting clause; and those who set up any such exceptions, must establish it as being within the words as well as within the reason thereof."

We have no quarrel with the rule announced or with the result to which it leads in a case where it applies; and we might, without weakening our contention, admit that it applies here. Then what? That our case is within the exception and that we have established it as being within the words as well as within the reasons thereof.

Let us apply the rule to the proviso under consideration. Let us admit that the enacting clause is general in its language and objects; that the proviso is to be construed strictly, and that it does not take anything out of the enacting clause which does not fall fairly within its terms. And where does it lead? It will not be seriously contended that the enacting clause had any application to either crew until the expiration of the full period of 16 hours after starting on duty—the hour which set it in motion. The fiat is "thou shalt not *after* the 16-hour period require or permit." *After* that hour had struck nothing could arrest the operation of the enacting clause. A casualty or unavoidable accident which might occur in the 17th hour would be no defense,

for by continuing the crew in service *after* the 16th continuous hour (in the absence of justifiable antecedent delay) the statute would be violated. Necessarily, therefore, the only cause which could defer the application of the enacting clause would be one occurring *during* the 16-hour period. Such a happening might occur at any time during the 16-hour period, the first minute of the first hour, or the last minute of the last hour; and when it does happen, it is within the words as well as within the reason of the proviso.

The opinion of the Circuit Court of Appeals concedes that when the crew reached Daggett, the enacting clause of the act had not been violated, although at that time the crew had been on duty for a continuous period of more than 17 hours. If the enacting clause had not been offended against, it was because the proviso had removed its application. Otherwise stated, up to the time the train and its crew reached Daggett, the carrier had not been subject to the enacting clause of the act. If it be admitted that the consequences of the antecedent casualty ceased at Daggett, then it follows logically that the enacting clause of the act would not begin to press down before the expiration of the 16-hour period after leaving that point, and the crew was released long before that. If we have applied and worked out the rule correctly, then none of the counts involved herein stated a cause of action.

Another possible effect of the application of the rule under consideration would be to give the carrier credit—to extend by so much—the time lost in consequence of the operation of one of the causes specified in the proviso. This, obviously, could be one of the results of the strict construction called for by the rule applied by the Circuit Court of Appeals. But the language of the proviso omits all words which fix or tend to fix any period during which the act shall not apply. This omission suggests that if it was the intention of the law-makers that the act should only be suspended until the effect of a specified cause wore

off or became obliterated, they certainly failed to express it. Instead they employed language of clear and unmistakable import: "this act shall not apply * * *."

It thus appears that the necessary effect of the construction of the Circuit Court of Appeals is to inject into the proviso words not found there of the following import: "The provisions of this act shall not apply * * * but every employee detained by reason thereof shall be relieved at the earliest possible moment determined by the exercise of the highest degree of care." Such improvisation, we urge, was necessary to sustain the construction in this case.

It seems to us that the proviso under consideration performs a more important function than that performed by the ordinary proviso, which commonly is to state an exception. This proviso prescribes a condition which serves to place certain matters beyond the reach of the enacting clause; which is tantamount to saying that the application of the statute is entirely removed by certain causes. This gives vitality and meaning to the proviso. This is no more than the effect of another well-known rule of construction, quite as ancient and respectable as the other one, viz., that the rule in the construction of statutes, that a proviso is to be considered as a limitation upon the general words preceding, or an exception therefrom, is not absolute, *and that the meaning of the proviso must generally be ascertained from its language.*

Traders' Nat. Bank *vs.* Lawrence Mfg. Co., 96 N. C., 298.

Tested by this rule, the language of the proviso, released from the fetters of rules of construction, is unmistakable, plain, direct, and unambiguous. *"The provisions of this act shall not apply."* The plain import is that the provisions of the law, the whole law, shall have no application in certain emergencies. There are wanting any general qualifying words. The language is clear and needs no interpretation. The meaning is easily ascertained from its language.

The construction for which we here contend is the construction accorded to the act by the Circuit Court of Appeals for the Eighth Circuit, in the case of U. S. *vs.* Mo. Pac. R. R. Co., 213 Fed. Rep., 169. In that case the court, speaking through Sanborn, J., say (pp. 172-173):

> "The chief object of the Congress in enacting the proviso in section 3 was to promote and insure the safety of travelers and employees on railroads in cases of casualties, unavoidable accidents and grave catastrophes affecting the operation of railroads. The danger to travelers and employees upon trains running upon the roads from the absence of the service of telegraphers and train dispatchers who control their movements is vastly greater than from the absence of the service of any other class of employees, and that fact is a persuasive reason why the Congress excepted them, as well as all other employees, from the limitation of their hours of service fixed by section 2 of the act in every case of a casualty, an unavoidable accident, or an act of God. That Congress was of the opinion that it was more important to insure their continued service than that of any other class of employees under such circumstances is demonstrated by the fact that it permitted their service in any emergency whatever four hours longer than the time generally limited for their service, while it permitted no such excess of service to other employees in any case except in a case of casualty, unavoidable accident, or act of God. There are other reasons not less convincing why the position of counsel for the Government is not tenable. If the parts of this act of Congress that are not relevant to the question under consideration are laid aside, the clear terms of section 2 prohibit the service of telegraph operators and train dispatchers in day offices more than 13 hours, and in case of emergency more than four hours longer in 24 hours, prohibit the service of such operators and dispatchers in night and day offices more than 9 hours and in case of emergency more than 4 hours more in 24 hours, and prohibit the service of other employees more than 16 hours in 24 hours. The expressed terms of section 3 make

every common carrier liable for a penalty of $500 for every violation of section 2, and declare that none of the provisions of the act shall apply in any case of casualty, unavoidable accident, or act of God. If none of the provisions of the act apply in any case of casualty, unavoidable accident, or act of God, then the provisions of the act which prohibit the service of telegraph operators and train dispatchers in day offices for a longer period than 13 hours, and in case of emergency 4 hours more in 24 hours, do not apply in such cases, and so it is that the unambiguous terms of the act expressly declare that the limitations of the hours of service of telegraphers and train dispatchers in section 2 have no application in any case of casualty, unavoidable accident, or act of God.

"The apparent and natural meaning of the terms of a statute is always to be preferred to any curious hidden signification deduced by the reflection and ingenuity of acute and powerful intellects, and where the language of a statute is unambiguous and its meaning is plain, no room is left for construction. United States *vs.* Ninety-nine Diamonds, 139 Fed., 961, 964; 72 C. C. A., 9, 12; 2 L. R. A. (N. S.), 185; First National Bank of Anamoose *vs.* United States, 206 Fed., 374; 124 C. C. A., 256; 46 L. R. A. (N. S.), 1139.

"Congress had the right and the power to prohibit the application of all or of only a part of the provisions of the act in cases of casualties, unavoidable accidents, and acts of God. It enacted 'that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God,' and it made no exception. The construction for which counsel for the Government contends requires the amendment of this prohibition by the interpolation of an exception therein so that it will read:

" 'That the provisions of this act, except those in section 2, which relate to the hours of service of the operators and train dispatchers and others of their class, shall not apply in any case of casualty, or unavoidable accident, or the act of God.'

"But where the legislative body makes no excep-

tion to a general and clear declaration of its will, the conclusive presumption is that it intended to make none, and it is not the province of the courts to do so" (citing numerous cases).

Again, on pages 174-5, the court said:

"There is still another rule of construction that persuades to the same conclusion. This is a suit for the collection of a penalty of $500 for a violation of this act of Congress. The act created and denounced a new offense. A statute which creates a new offense and prescribes its punishment must clearly state the persons and the acts denounced. An act which is not clearly an offense by the expressed will of the legislative body before it was done may not be lawfully or justly made such by construction after it is committed, either by the interpolation of expressions or by the expunging of its words by the judiciary. And as this statute not only failed clearly to denounce as an offense requiring or permitting an operator or train dispatcher to serve beyond the hours limited in section 2 in case of casualty, an unavoidable accident, or the act of God, but positively declared that in such a case the provisions of the act which denounced such excessive service as an offense did not apply, the defendant may not lawfully be punished for such an act (cases cited).

"And the result is that the plain terms of the statute, the reason of the case, and the rules and authorities upon the construction of statutes to which reference has been made have convinced that the proviso of section 3 of the 'Act to promote safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,' approved March 4, 1907, commonly known as the hours of service act, exempts a common carrier from liability for the penalty specified therein when in a case of casualty, unavoidable accident, or the act of God it necessarily requires or permits a telegraph operator, train dispatcher, or other employee of their class to serve beyond the time limited for his service by section 2 of that act."

Again, on page 174, the court say:

> "It is incredible that the Congress intended to prohibit, or did prohibit, such extended service by operators, train dispatchers, and others in their class in cases of such casualties and unavoidable accidents. The object of the statute, the safety of travelers and employees, demands of humanity, and a rational and practical interpretation of the statute converge with compelling force to convince that the Congress intended what it expressed, that 'the provisions of the act,' *all the provisions of the act*, those relating to the hours of service of telegraphers and train dispatchers, as well as those relating to the hours of service of other employees, 'shall not apply in any case of casualty or unavoidable accident or act of God.'" (Italics ours.)

From what has been stated it is apparent that there is a conflict between the Circuit Court of Appeals of the Ninth Circuit and the Circuit Court of Appeals of the Eighth Circuit touching the true interpretation to be accorded to the statute under consideration, the opinion of the former being manifested by its decision and opinion in this case, and that of the latter in the case of U. S. *vs.* Mo. Pac. R. Co., *supra*. It would seem, therefore, that in order to harmonize these conflicting views herein indicated, and to have authoritatively decided and set at rest questions which concern every carrier, this is a proper case to be reviewed by this court through the writ of *certiorari*.

Respectfully submitted,

ALEX. BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for Petitioner.

INDEX.

	PAGE
Statement of Case	3
Third, Fourth and Fifth Causes of Action	5
Sixth, Seventh and Eighth Causes of Action	6
Question Involved	7
Statute Involved	8
The Answer	9
As to Train No. 1	13
As to Train No. 7	17
Findings of Trial and Appellate Courts	19
Commission's Interpretation of Act	20
Agreed Facts	23
Decision of Appellate Court	24
Defendant's Contentions	27
Opposing Contentions	30
View of Appellate Court	32
Specification of Errors Relied on	33
Questions of Law Raised by Specifications	42
Argument	45
The Proviso	45
Conditions Which Remove Application of Statute	52
Terminal	62
Purpose of the Proviso	65
Commission's Construction of Proviso	70
Judicial Construction	81
Legislative Construction	88
Re-enactment After Executive Construction	88

Appendix: PAGE
Extracts from Congressional Record, Showing Amendments Proposed, Debates, etc..... 93
Senate Proceedings..... 93
Amendments Proposed in Senate..... 93
Remarks of Senators..... 97
House Amendments.....110

Authorities.

PAGE

B. & O. R. R. v. I. C. C., 221 U. S. 612.... 60
Blood v. Beal (Me. '05), 60 Atl. 427 (430). 55
Brown v. U. S., 113 U. S. 568, 28 L. Ed. 1080 ..... 72, 74
Copper Queen Consol. Min. Co. v. Arizona, 206 U. S. 474, 51 L. Ed. 1143..... 90
De Yturbide v. U. S., 63 U. S. (How.) 290. 59
Ewing's Lessee v. Burnett, 11 Pet. 41 (54), 9 L. Ed. 624 (630)..... 54
Ex parte Hall, 18 Mass. (1 Pick) 261..... 64
Green v. Weller, 32 Miss. 650..... 64
Heath v. Wallace, 138 U. S. 573, 34 L. Ed. 1068 72
Hobbs v. McLean, 117 U. S. 567, 29 L. Ed. 940 87
Lambert v. People, 76 N. Y. 220 (225).... 56
Maxwell v. Moore, 63 U. S. 185..... 59
M. K. & T. Ry. v. U. S., 231 U. S. 112.... 60
N. Y. etc. A. E. v. I. C. C., 200 U. S. 361, 50 L. Ed. 515..... 89
No. Pac. Ry. v. Washington, 222 U. S. 370, 56 L. Ed. 237..... 76
Penoyer v. McConnoughy, 140 U. S. 1..... 72
S. P. L. A. & S. L. R. R. Co. v. United States, 220 Fed. 737.....19, 32

PAGE

Smith v. Townsend, 148 U. S. 490, 37 L. Ed. 534 63
Standard Oil Co. v. U. S., 221 U. S. 1 (50), 55 L. Ed. 619..... 64
Taylor v. Caribou (Me. '07), 67 Atl. 2 (4). 55, 56
Tingley v. Gorham, 5 Cal. 418..... 64
Tyrrell v. Mayor (N. Y. '99), 53 N. E. 1111 (13) 55
U. S. v. Ala. R. R. Co., 142 U. S. 616..... 72
U. S. v. A. T. & S. F. Ry. Co., 212 Fed. 1000 .....62, 84
U. S. v. Corecede, 209 U. S. 377..... 72
U. S. v. Dickson, 15 Pet. 141..... 46
U. S. v. Finnell, 185 U. S. 236, 46 L. Ed. 890 73
U. S. v. Goldenberg, 168 U. S. 103, 42 L. Ed. 398..... 87
U. S. v. Johnson, 124 U. S. 236, 31 L. Ed. 389 74
U. S. v. K. C. So. Ry. Co., 202 Fed. 828.59, 81
U. S. v. Mo. Pac. Ry. Co., 213 Fed. 169 ... 58
U. S. v. Moore, 95 U. S. 760.....72, 73
U. S. v. Nor. Pac. Ry. Co., 215 Fed. 64.... 83
U. S. v. Three R. R. Cars, 28 Fed. Cas. (No. 16513) 54

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM 1916.

No. 716. 244

San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation,

Plaintiff in Error,

v.

The United States of America,

Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

NOTE: [Plaintiff in error will be hereinafter referred to as defendant, and defendant in error as plaintiff.]

This is an action brought against the defendant for the recovery of penalties for alleged

violations of the act of Congress, known as the Hours of Service Act.

The complaint in case No. 106, Civil (below), contained five separate counts or causes of action, and the judgment prayed for was $2500.00. [Tr. p. 13.] The complaint in case No. 243, Civil (below), contained 22 separate counts or cause of action, and the judgment prayed for was $11,000. [Tr. p. 54.] Case No. 243, Civil, was, by order of the trial court made before trial, consolidated with case No. 106, Civil, and the two cases as thus consolidated, were tried together. There was an instructed verdict for plaintiff upon all counts in each case, except the 4th count in case No. 106, where a verdict was instructed for defendant. Following the verdict, the court pronounced judgment against the defendant as follows: $100 on each of the following causes of action in case No. 243, namely, 1, 2, 3, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22; $150 on each of the following causes of action in case No. 243, namely, 3, 4, 5, 6, 7 and 8; and $150 on each of the following causes of action in case No. 106, namely, 1, 2 and 3; in all $2,950.00, together with costs taxed at $71.20.

Defendant thereafter appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, where the judgment of the court below was affirmed, except

that the judgment so far as it affected counts 1, 2 and 3 of the complaint in case No. 106, was reversed.

Defendant now challenges and seeks to have reviewed only so much and such part of the judgment of affirmance of the United States Circuit Court of Appeals for the Ninth Circuit (hereinafter referred to as the Appellate Court) as deals with each the 3rd, 4th, 5th, 6th, 7th and 8th counts or causes of action, as they are severally set forth in the complaint in case No. 243, Civil. [Tr. p. 31.] The judgment of affirmance sought to be reviewed and reversed appears at page 168 of the transcript, and the opinion is reported in 220 Federal Reporter, at page 737.

Third, Fourth and Fifth Causes of Action in Case No. 243, Civil.

It was alleged in the third cause of action in said case No. 243, Civil, in substance as follows:

Defendant, beginning at the hour of 5 o'clock p. m. on October 3, 1912, upon its line of railroad at and between the stations of Las Vegas, Nevada, and Los Angeles, California, required and permitted its conductor and employee, one G. D. Brown, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from 5 o'clock p. m.

on October 3, 1912, to 8 o'clock p. m. on October 4, 1912; that said employee while so permitted to be and remain on duty, was engaged in and connected with the movement of defendant's train No. 1, drawn by its locomotive No. 3434, said train being then and there engaged in the movement of interstate traffic. That by reason of the violation of said act of Congress defendant is liable, etc. [Tr. pp. 34-35.]

The fourth and fifth counts, or causes of action, of said complaint, are identical with the third, save that in the fourth brakeman Edwards is involved, and in the fifth brakeman Berringer is involved.

Sixth, Seventh and Eighth Causes of Action in Case No. 243, Civil.

It was alleged in the sixth cause of action in said case No. 243, Civil, in substance as follows:

Defendant, beginning at the hour of 5:30 o'clock a. m. on October 4, 1912, upon its line of railroad at and between the stations of Las Vegas, Nevada, and Los Angeles, California, required and permitted its conductor and employee, one J. F. Fitzpatrick, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from 5:30 o'clock a. m. on October 4, 1912, to 6:25 o'clock a. m. on October 5, 1912; that said

employee while so permitted to be and remain on duty was engaged in and connected with the movement of defendant's train No. 7, drawn by its locomotive engine No. 3433, said train being then and there engaged in the movement of interstate traffic; that by reason of the violation of said act of Congress defendant is liable, etc. [Tr. pp. 37-38.]

The seventh and eighth counts, or causes of action, of said complaint are identical with the sixth, save that in the seventh brakeman J. S. Roberts is involved, and in the eighth brakeman C. A. Carter is involved.

The trial court assessed a penalty of $150.00 on each of said counts or causes of action, or $900.00 in the aggregate.

It will thus be seen that but two trains and their respective crews are involved in the causes of action in respect of which the reviewing action of this court is invoked.

Question Involved.

The question involved is, whether a trainman may be lawfully continued on duty upon a train in excess of sixteen hours and until his train reaches the terminal fixed for his usual run, which would generally be easily reached within the sixteen hour limit, but in a particular case is prevented by something unforeseen and unpreventable occurring after he starts on his run.

Do the inhibitions of the statute apply to such a case?

Statute Involved.

The statute upon which the government's action was based, is the act of Congress entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, (34 St. L. 1415), and which, by its terms, became effective March 4, 1908, or "one year after its passage."

So far as it is applicable to this case, the act provides:

> "Sec. 2. That it shall be unlawful for any common carrier * * * to require or permit any employee * * * to be or remain on duty for a longer period than sixteen consecutive hours and whenever any such employee * * * shall have been continuously on duty for sixteen hours, he shall be relieved * * * until he has had at least ten consecutive hours off duty" * * *
>
> "Sec. 3. That any such common carrier * * * requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty * * * *provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left*

a terminal, and which could not have been foreseen" * * *

"Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act and the powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act."

The Answer.

To each of said specified counts, or causes of action, defendant interposed an answer in the nature of a specific denial. However, by force of a stipulation signed by the parties [Tr. p. 82 —Stipulation of Facts], duly filed and read in evidence, defendant was allowed to take advantage of, and to present, and did present, every defense to said counts which the agreed facts raised and were available to it without the necessity of filing an amended or supplemental plea particularizing those defenses. The defenses thus open to defendant and presented to and passed upon by the trial court, as well as the Appellate Court, were:

(a) That the excessive hours of service complained of were:

(1) The result of a casualty or unavoidable accident or the act of God;

(2) The result of a cause not known to defendant or its officer or agent in charge of the crew of either of the trains involved at the time

said crews left their terminal, to-wit, Las Vegas, Nevada, and which could not have been foreseen.

(b) That the excessive hours of service complained of having been those which resulted directly and solely from one or both of the causes specified in "(a)," defendant was not guilty as charged in either of said counts, as under the express terms of the first proviso of section 3 of said Act of Congress, the existence of one or both of said causes removed the application of the act.

(c) That under the provisions of section 3 of said act, as interpreted by the Interstate Commerce Commission, and as exhibited by its rule No. 88 of its Administrative Rulings, adopted and published June 25th, 1908, each member of each crew of each of the trains, said trains being overtaken by casualty or unavoidable accident or the act of God, or delayed as the result of a cause not known to defendant or its officer or agent in charge of said crews at the time said crews left their terminal, to-wit, Las Vegas, Nevada, and which could not have been foreseen, was lawfully authorized to remain on duty with said trains until said trains reached their terminal or end of their run or trip, to-wit, Los Angeles, California.

(d) That each of said train crews was, pursuant to and in reliance upon, said Administrative Ruling No. 88, permitted to remain on duty with said trains until said trains reached their terminal or end of their runs or trips, to-wit, Los Angeles, California.

(e) That a casualty or unavoidable accident, within the purview of the first proviso of section 3 of said act, occurred after the crews respectively left their terminal, to-wit, Las Vegas, Nevada, and, therefore, the provisions of said act did not apply to either of said crews, or any member thereof, while they were on duty with said trains.

(f) That defendant was unable to relieve said crews at either Daggett or San Bernardino, California, neither of which points was a terminal or relay station for trains of the class referred to in said counts or causes of action; said trains being passenger trains.

(g) That defendant maintained no relief crews for passenger trains at either Daggett or San Bernardino, California, and was, therefore, unable to relieve the crews of said trains at said named points, except by sending relief crews for that purpose from Los Angeles, distant from San Bernardino about 68 miles, and from Daggett about 159 miles; which, defendant sub-

mits, it was not required to do under any interpretation of the provisions of the first proviso of section 3 of said act, nor as the same was interpreted by the Interstate Commerce Commission by its Administrative Ruling No. 88 aforesaid, reading:

> "Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted (the first proviso of section 3) removes the application of the law to said trip."

(h) That said Administrative Ruling No. 88, and the construction embodied therein, were reported to Congress by the Interstate Commerce Commission in each of the years 1908, 1909, 1910, 1911 and 1912, and were accepted and adopted by Congress as the true construction of said proviso.

(i) That the members of each of the crews of said trains lawfully continued on duty therewith *until the end of the run or trip*, to-wit, Los Angeles, California.

(j) That the uncontradicted evidence and the stipulated facts show that the excessive hours of service involved in said counts or causes of action were, as to each employee therein mentioned, the result of a casualty or unavoidable accident or the act of God; and were also the result of a cause or causes not known to de-

fendant or its officer or agent in charge of the crews of said trains at the time said crews left their terminal, to-wit, Las Vegas, Nevada, and which could not have been foreseen; and that none of the delays characterizing the movement of said trains was due to any negligence on the part of defendant, and that all of said delays were compelled and justifiable, in this:

As to Train No. 1, Covered by Counts 3, 4 and 5, in Case No. 243, Civil.

The crew of this train took charge of it at Las Vegas, Nevada. After it left Las Vegas, a heavy land slide occurred on defendant's line of railroad at a point west of Las Vegas, (the train being westbound) between Crucero Junction and Otis, which land slide completely disabled said line and put it out of commission. "The land slide was due to heavy rains in the hills, severe electrical storms and storm water running strongly in the waterways." [Tr. p. 98.] The fact that the land slide had occurred was unknown to and could not have been foreseen by defendant or its agent or officer in charge of said crew at the time said crew and train left Las Vegas; said land slide was a casualty or unavoidable accident or the act of God, and which, in its consequence, was unparalleled on the line of defendant; that as a result of said land slide and consequent line disablement, de-

fendant was compelled to detour said train over the railroads respectively of the Tonopah & Tidewater Railroad Company and the Atchison, Topeka & Santa Fe Railway Company (hereinafter referred to as the Santa Fe Company); over the former from Crucero Junction to Ludlow, and over the latter from Ludlow to Daggett. In effecting the detour, numerous delays were encountered, all of them, however, justifiable, and none of them, or the fact that a detour was necessary, foreseen or foreseeable at the time said train left Las Vegas. That when said train reached Daggett, where it again entered upon the main line of the Santa Fe Company, over which defendant, under contract, enjoyed "running rights," the crew had been on duty approximately 17 hours and 5 minutes, or 1 hour and 5 minutes in excess of 16 continuous hours. That the train dispatcher of defendant having the control and direction of said train while it was on defendant's own line of railroad, did not know, and could not have known, because of disturbances of defendant's telegraph lines as a result of untoward weather conditions, when said train arrived at or left Ludlow, a station as aforesaid on the line of the Santa Fe Company [Tr. p. 93]; he did, however, know of its arrival at Daggett, and also knew at that time that it was impossible for the train to reach its terminal (Los Angeles), within the 16

hour period, which period had already expired; that the line of railroad extending from Daggett on the east, where it connected with defendant's line thence to Salt Lake City, to Colton on the west, where it again connected with the line of defendant thence to Los Angeles, was owned by and in the exclusive control of the Santa Fe Company, but over which, subject to the direction of the train dispatchers of that company, defendant by virtue of a contract with that company enjoyed "running rights" for its trains; that defendant had no voice or participation in the actual operation of the line of the Santa Fe Company, or in the operation of trains thereover; its trains having moved thereover under the control and direction of the train dispatchers of the Santa Fe Company.

That Otis was a station on the line of defendant situated approximately four miles east of Daggett. Otis, however, was a terminal for the relief of *freight crews* only, and not for passenger crews. While the freight crews maintained at Otis were severally qualified for passenger service, nevertheless, all such freight crews at the time in question, were engaged in work train service at the scene of the land slide mentioned, clearing and rehabilitating the line of defendant, so as aforesaid, out of commission by reason of said land slide. That Daggett was not a relay station for the relief of train

crews or engine crews of any class; Daggett was a station of and on the line of the Santa Fe Company.

San Bernardino was not a passenger train crew terminal for the through trains of defendant. Two crews of local passenger trains, running between San Bernardino and other local points, were maintained at San Bernardino, for the purpose alone of operating said local passenger trains to which they were assigned, and no others. Each of said local passenger train crews was composed of a conductor and one brakeman. The through passenger train of defendant, No. 1, in the course of its journey toward and to Los Angeles, ran from San Bernardino to Colton Junction over the line of the Santa Fe Company, while the two local passenger trains aforesaid ran from San Bernardino to Riverside Junction over the line of railroad of the Southern Pacific Company, by force of a trackage agreement with that company. Neither of the crews assigned to said local passenger trains could have been assigned to relieve the crew of defendant's train No. 1; and, moreover, said local passenger train crews respectively, was composed of two employees of defendant, to-wit, a conductor and one brakeman, while the crew of defendant's train No. 1 was composed of three employees, to-wit, a conductor and two brakemen; and furthermore, the members of said local crews were

unfamiliar with the line of railroad extending from San Bernardino to Colton Junction aforesaid, and had never operated any trains thereover.

That the schedule time of said train No. 1, between Las Vegas, Nevada, and Los Angeles, California, at the time mentioned in said counts or causes of action, was 13 hours and 30 minutes; and in this:

As to Train No. 7, Covered by Counts 6, 7 and 8, in Case No. 243, Civil.

That the train crew of train No. 7 went on duty at Las Vegas, Nevada; that this train, on October 4, 1912, was a limited passenger train; that it left Las Vegas at 6:12 o'clock a. m. of that day, on schedule, and arrived at Los Angeles, the end of the run, on the next succeeding day, to-wit, October 5, 1912, at 6:28 a. m., having been on the rails an aggregate period of 24 hours and 10 minutes, during all of which time the employees named in said counts respectively, were on duty with said train 1; that the schedule running time of this train between Las Vegas and Los Angeles was 11 hours and 28 minutes; that this train, upon the grounds and for the reasons set forth in respect to defendant's train No. 1, was compelled to detour via the lines respectively of the Tonopah & Tidewater and the Santa Fe Companies, between Crucero Junc-

tion, a point on the line of the former, and Ludlow, a point on the line of the latter, and thence on the rails of the latter to Daggett. It arrived at Daggett at 2:50 o'clock p. m., and departed thence at 3:35 o'clock p. m. on October 4, and reached San Bernardino at 3:34 a. m. on October 5,—7 hours and 3 minutes after the expiration of the 16 hour period. That upon arriving at Daggett, the train crew had been out of Las Vegas, counting from the time they had reported for duty, 9 hours and 20 minutes, and but for the delays encountered subsequently, and notwithstanding the detour, should have reached Los Angeles, the end of the run, within the 16 hour period; the schedule time between Daggett and Los Angeles being 5 hours and 35 minutes; and which, added to the 9 hours and 20 minutes, made a total of 14 hours and 55 minutes. [Tr. p. 98.] That after leaving Daggett said train encountered serious delays, none of which could have been foreseen when the train left that point, to-wit: a delay of 24 minutes between Barstow and Victorville, due to a heavy wind storm; a further delay of 8 hours and 18 minutes at Hesperia, by reason of the main line of the Santa Fe Company, over which said train No. 7 was proceeding, being blocked at Lugo by the derailment of a Santa Fe freight train, caused by a car breaking in two while being pulled into a siding,

thereby blocking the main line and preventing the movement of defendant's train No. 7, and a further delay of 10 minutes at Lugo, where the derailment occurred, by reason of the main line being blocked by the wrecking outfit of the Santa Fe Company having in tow the derailed car, compelling defendant's train to enter the siding and back out again in order to get by it. [Tr. p. 98, *et seq.*] The combined delays arising out of the circumstances recited, represented a total of 8 hours and 52 minutes.

Findings of the Trial Court and Appellate Court with Respect to Defendant's Defenses to Counts 3, 4, 5, 6, 7 and 8 of Case No. 243, Civil.

Both the trial court and the Appellate Court, the latter certainly, as an examination of the opinion rendered by it shows [Tr. p. 151, *et seq*: 220 Fed Rep. 737], found that the delays which characterized said trains and necessitated the excessive hours of service on the part of their respective train crews, were due to casualty or unavoidable accident or the act of God; and also the result of a cause not known to defendant or its officer or agent in charge of the members of said crews at the time they left their terminal, and which were not foreseen or foreseeable; in other words, found that the delays were those necessitated, and hence, justifiable. Both courts,

however, appear to have construed the applicable act as requiring defendant, at all hazards, to change its crews at either Daggett or San Bernardino; and thus construing the act, found and adjudged defendant negligent, and hence guilty as charged, because it did not change its crews at said points.

Interstate Commerce Commission's Interpretation of the Act.

As already stated, the act, by its terms, became effective March 4, 1908. On March 16, 1908,—12 days after the act became effective—the Interstate Commerce Commission, the body charged by section 4 thereof with its enforcement, promulgated its Administrative Ruling No. 287 [Tr. p. 125], providing:

> "(i) Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains until such employees, so delayed, reach a terminal or relay point. (See Rule 88.)
>
> 'Casualty,' like its synonyms 'accident' and 'misfortune,' may proceed or result from negligence or other cause known or unknown. (Words and Phrases Judicially Defined, Vol. 2, 1003.)"

Subsequently, and under date of June 25, 1908, the Interstate Commerce Commission

promulgated its further Administrative Ruling No. 88 [Tr. p. 121], wherein, after quoting the first proviso of sec. 3 of the act, it announced:

> *"Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."* (Italics ours.)

Subsequently the Interstate Commerce Commission, in its 22nd Annual Report to Congress, dated December 24, 1908, quoted its Administrative Ruling No. 88, of June 25, 1908, as setting forth its interpretation of the proviso of section 3 of the act (see 22nd Annual Report, 1908, p. 50). In this report no reference to, or mention of, Administrative Ruling No. 287 of March 16, 1908, appears. In that report, as in subsequent annual reports, appears the following:

> "It is respectfully suggested that the law * * * be made specific, so as to restrict the exercise on the part of carriers of discretion in determining whether or not a given incident is a 'casualty' or 'unavoidable accident' within the meaning of the act; or that some one should be designated and empowered to decide all such questions * * * It is therefore desirable that Congress should, by a few lines of explanation, so clarify the situation as authoritatively to settle most of the questions that may arise * * *"

It is to be said that neither by any subsequent report to Congress, nor by any subsequent administrative ruling, has the Interstate Commerce Commission ever changed, modified or repudiated its interpretation of the proviso of section 3 of the act, as embodied in its administrative ruling of June 25, 1908, unless the prosecution of the case under inquiry is itself a repudiation of that interpretation. If it is to be accorded that effect, then it is to be said that the first notice of its modification or repudiation conveyed to defendant was the commencement and maintenance of this suit for penalties.

In numerous reports to Congress since 1908, the Interstate Commerce Commission reiterates the recommendations embraced in the report last referred to, but Congress has never seen fit to "clarify the situation," or to express any disapproval of the construction accorded to the proviso by the commission, nor has Congress seen fit to amend the act, except in one particular, which was accomplished by the act of Congress of May 4, 1916 (S. 3769—Pub. 68, Title LVI. A Chapter F, Section 8679, U. S. Comp. Stat. Amendments 1916), which, after providing that a carrier permitting any "violation of the second section hereof shall be liable to a penalty of not less than $100 nor more than $500 for each and every violation," reenacts the proviso in the terms in which it was

originally written. Therefore, it is that we claim Congress adopted the commission's construction accorded to the proviso of section 3 of the act.

Agreed Facts.

The case against defendant, so far as the counts hereinbefore mentioned are concerned, was tried upon agreed facts, designated in the transcript as "Stipulation of Facts" [Tr. p. 82, *et seq.*] and upon the testimony of but one witness, Carl P. Smith, an employee of defendant, called on behalf of the government. The statement of facts and the testimony of the witness, present and illustrate the controversy. The facts, uncontradicted, are those already outlined in this brief. There is this to be said in addition, that Los Angeles was the only point where a relief crew at that time could have been obtained, and in order to have relieved the crew of train No. 7 at San Bernardino, which was the only point where it was at all possible to relieve it, it would have been necessary for defendant to send a special train from Los Angeles for that purpose. The same thing is true as to train No. 1, that is, it would have been necessary to send a special train with a relief crew from Los Angeles either to San Bernardino, a distance of approximately 68 miles, or to Daggett, a distance of approximately 159

miles. Therefore, as matter of law, defendant was not negligent in not relieving said crews at either of said points, unless it was bound at its peril to ship a relief crew from Los Angeles to one or both of said points.

The Decision of the Appellate Court.

The judgment and opinion of the Appellate Court affirmed the judgment of the trial court upon each of the counts hereinbefore mentioned. In the course of the opinion and decision, the Appellate Court held that:

> "As under the evidence there can be no doubt that the land slide was the direct and necessary cause of the detour of the train in question (trains 1 and 7, the former covered by counts 3, 4 and 5, and the latter by counts 6, 7 and 8, of the complaint in case No. 243, Civil) and of its numerous delays, and that therefore the defendant company was entirely justified in continuing in service its train crew up to the time it could, *with the exercise of proper diligence have relieved it * * * that the defendant company had the opportunity to relieve that crew either at San Bernardino or Daggett, or both, and was, by the statute, properly construed, required to avail itself of it,*" and not having done so, was properly convicted. (Italics ours.)

In thus holding and deciding, the Appellate Court utterly disregarded and refused to consider or give effect to the contemporaneous construction given by the Interstate Commerce

Commission to the first proviso of section 3 of the act, promulgated June 25, 1908, in which that body held and declared, referring to said proviso: *"Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."* (Italics ours.)

The Appellate Court in its decision and opinion further held in effect, that: Admitting that, under the evidence, there was no doubt that the land slide was the direct and necessary cause of the detour of the trains and of their numerous delays, and that defendant was justified in continuing in service its train crews up to the time it could, with the exercise of reasonable diligence, have relieved them, and that it had such opportunity at San Bernardino or Daggett, or both, and was by the statute, properly construed, required to avail itself of such opportunity, defendant was bound, as a matter of law, to provide relief crews at San Bernardino, or Daggett, or both. In other words, that defendant was bound to ship relief crews from any place where such crews might be available at such time to either of the points named to relieve the crews of the trains in question. The evidence, uncontradicted, is that defendant did not maintain any terminal for or relief crew at Daggett, and that San Bernardino was

not a terminal or relay station for the relief of crews of trains of the classes in question; that Otis, a point four miles east of Daggett, was a terminal or relay point only for the relief of freight train crews, but that such crews at that time were not available, having been sent out to the scene of the land slide to rehabilitate the line. The evidence is also undisputed that the train dispatchers of defendant did not know, and could not have known, about the arrival of said trains at Ludlow, nor until they had actually entered the "joint line" at Daggett.

The decision and opinion further state that, (in support of that contention that it was the intention of Congress to permit a crew starting from a terminal to remain with a train overtaken by delay, casualty or unavoidable accident until the end of the run)," counsel earnestly rely upon Ruling 88 of the Interstate Commerce Commission, made May 25, 1908 [June 25, 1908], which, after quoting the first proviso of section 3 of the act, reads: "Any employee so delayed may therefore continue on duty to the terminal or end of the run. The proviso quoted removes the application of the law to that trip." That ruling must be read and construed in connection with the preceding ruling of the commission made March 16, 1908, which reads as follows:

"The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point."

and must also be read in connection with the action of the commission shown by the record in this case, that the suit was directed to be brought by the attorney general at the request of the Interstate Commerce Commission. But over and above that, it is the obvious duty of the court to give effect to what it conceives to be the true construction of the act of Congress."

Contentions of Defendant in the Appellate Court by Appropriate Assignments of Error.

Defendant directed the attention of the Appellate Court to its contentions, respectively, (1) that the judgment under review was contrary to the agreed facts; (2) the evidence, and (3) to the provisions of the Hours of Service Act, for the reasons:

1. Because the agreed facts and the evidence show:

(a) That the terminals of the employees involved were two, Las Vegas, Nevada, marking the commencement, and Los Angeles, Cali-

fornia, marking the termination, of the run or trip.

(b) Because the storm which disabled the railroad and put it out of commission, occurred, in respect to train No. 1, after that train left Las Vegas, and before it reached Los Angeles.

(c) Because the line disablement which had compelled the detour of train No. 1, likewise caused the detour of train No. 7.

(d) Because the terminii of the run of both trains were the same, to-wit, Las Vegas, the commencement, and Los Angeles, the end.

(e) Because train No. 7 was delayed at Hesperia, at point on the "joint line" by reason of the wreck of a Santa Fe freight train, but for which train No. 7 would have reached its terminal, Los Angeles, within the period of 16 hours.

(f) Because the delay in each case and responsible for the excesive hours of service, was the result of a casualty or unavoidable accident; and was the result of a cause not known to defendant, or its officer or agent in charge of such employees at the time said employees left Las Vegas, and which could not have been foreseen at that time.

(g) Because the cause of the delay to train No. 7 at Hesperia, a point distant from San Bernardino, about 36 miles, was the result of a

casualty or unavoidable accident; and was the result of a cause not known to defendant, or its officer or agent in charge of such employees at the time such employees left Las Vegas, or Dagget, and which could not have been foreseen.

(h) Because, in connection with the wreck of the Santa Fe train at Hesperia, it was impossible during the time that wreck was being cleared away, to determine the duration of the delay to train No. 7 engendered thereby.

(i) Because the service of defendant's said train employees, circumstanced as they were and victims of the contingencies stated, ceased to be controlled or regulated by the Hours of Service Act during those trips.

(j) Because the socalled excess hours were not contrary to, or prohibited by, but were, on the contrary, expressly authorized by, the language found in the proviso to section 3 of the act, as well as by Administrative Ruling No. 88 of the Interstate Commerce Commission construing said proviso, promulgated by it for the guidance of carriers subject to the act, and relied on by defendant and acquiesced in by Congress.

(k) Because any other construction than that essayed by the Interstate Commerce Commission, and embodied in its said Administrative Ruling No. 88, would be in effect judicial legislation.

(l) Because any other construction is not

possible, and that any other construction, if admitted, would render abortive and nullify the plain terms of the proviso and inject into the act language not found therein; language which would deprive it of its vitality and meaning, and at the same time impose new requirements.

Opposing Contentions.

The contentions urged by the plaintiff in opposition to those urged by defendant, may be summarized thus:

1. That the construction essayed by the Interstate Commerce Commission, while entitled to some weight, is not controlling or decisive.

2. That the words "a terminal," as found in the proviso, do not refer to a terminal from which a member of a train crew starts on his trip, but to *any terminal* through which he may pass during the course of his usual or ordinary run.

3. That a delay from all or any of the causes enumerated in the proviso, does not beget a license to the carrier to continue in service its employees beyond the 16 hour period, or to the end of the run or trip of the train delayed by either of said causes.

4. That the failure to relieve an employee after 16 hours of continuous service is not justified by a showing that his train was delayed en

route by one or more of the causes specified in the proviso, but that the duty to relieve an employee is continuing and mandatory, even though the delay results from one of the causes specified in the proviso as determining the circumstances under which "the provisions of this act shall not apply."

5. That an excusable failure to prevent excess service (as where a train is delayed as the result of one of the causes specified in the proviso and the carrier is for any reason unable to relieve its employees at the expiration of the 16 hour period) does not authorize the carrier to abandon, or permit it to abandon, "all efforts thereafter to provide relief for such employees."

6. That the "delay" found in the proviso, refers to the delay of the carrier in relieving employees after 16 hours of continuous service, as required by section 2, and does not refer to delay suffered by the particular train or employee, and that even after the happening of a cause of delay, the duty still abides with the carrier to provide relief at the earliest opportunity in order to minimize the excess service.

View of the Appellate Court.

The Appellate Court, as will be seen from its opinion and decision [Tr. p. 151; 220 Fed. Rep. 748]; sanctioned and adopted the contentions of the government, the opinion announcing, in effect, that although defendant was entirely justified in continuing its crews in service up to the time it could, with the exercise of proper diligence, have relieved them, still the act required defendant to avail itself of the opportunity of relieving the crews at Daggett, or San Bernardino, or both.

In other words, the Appellate Court, in construing the proviso of section 3 of the act, held that it was:

Not the intention of Congress to permit a crew starting from a terminal (initial terminal) to remain with a train overtaken by delay, casualty or unavoidable accident until the end of the run or trip; but that on the contrary, it was the intention that such crew might be continued in service (beyond the 16 hour period) up to the time that the carrier could, with the exercise of reasonable diligence have relieved them.

The Appellate Court thereafter denied an application for a rehearing of said cause properly and timely interposed by defendant, and defendant, thereafter, within the time allowed by law, applied for, and was allowed, a writ of error herein returnable to this court.

Specification of Errors Relied on.

Assignment I.

The Appellate Court erred in sustaining the action of the trial court in refusing to direct a verdict in favor of defendant upon each the third to eighth counts or causes of action inclusive in case No. 243, Civil, as set forth respectively in assignments VII to XII inclusive, urged before the Appellate Court for the reason that it affirmatively appears, not only from the record before it, but from the opinion of said last named court:

1. That the trains of which the employees named in said counts were in charge, had been delayed by casualties and unavoidable accidents after such trains and employees had started upon their respective runs, and before the expiration of sixteen hours;

2. That the delays to which said trains, and the employees in charge thereof, were subject, were the results of causes not known to defendant, or to any of its officers or agents in charge of such employees at the time such employees left a terminal—Las Vegas—and which could not have been foreseen.

Assignment II.

The Appellate Court erred in refusing to sustain the first assignment of errors presented to it, and urged by defendant, as follows:

"1. The trial court erred in instructing the jury as follows: In the two cases, gentlemen of the jury of the United States of America against San Pedro, Los Angeles & Salt Lake Railroad Company—one of them is numbered 106 and the other 243—which, by reason of their consolidation, have been tried together, the facts are agreed upon. There is no controversy but that in all of the cases mentioned in the complaint—both complaints—the employees named in each count were permitted to remain on service for periods longer than those allowed by the statute. In each case the defendant sought to justify the detention of the allowing of these employees to remain on service. The facts are agreed upon, and hence it is a matter of law for the court to determine. And upon these agreed facts I shall hold, and do hold, as matter of law, that none of the defenses to any of the causes of action, except the fourth cause of action in complaint number 106, are good. The court, therefore, instructs you—and it is your duty to obey the instructions of the court—to find in favor of the plaintiff on each count of the complaint in such case, except the fourth count or fourth cause of action in the complaint in case 106, and on that cause of action you will return a verdict in favor of the defendant. Submit the form of verdict to the jury, and let one of your number be selected as foreman and let him sign the verdict."

ASSIGNMENT III.

The Appellate Court erred in affirming the verdict and judgment of the trial court, based upon the 3rd to 8th counts or causes of action inclusive, in case No. 243, Civil, for the reason that it affirmatively appears from the record, which was before said Appellate Court, that the service of each of the employees described in each of said respective causes of action was not in violation of the act of Congress, entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, (34 St. L. 1415) because said act does not by its terms prohibit, but does, on the contrary, expressly authorize, such service, under such circumstances disclosed by the record, and, because said Appellate Court expressly found that the delays to which the trains of which said employees were in charge were subject, were the results of casualties, unavoidable accidents, and acts of God, and of causes which were not known to defendant, or to any of its officers or agents in charge of said employees, at the time they left their terminal at Las Vegas, and which could not have been foreseen.

ASSIGNMENT IV.

The Appellate Court erred in not reversing the verdict and judgment of the trial court in

so far as it was based upon the 3rd to 8th counts or causes of action respectively in case No. 243, Civil, for the reason that it affirmatively appears from the record before said Appellate Court that the service of the employees in said causes of action described, was justified by reason of the proviso found in section 3 of said act of Congress, approved March 4, 1907 (34 St. L. 1415).

ASSIGNMENT V.

The Appellate Court erred in interpreting and construing said act of Congress of March 4, 1907, and in holding and deciding that by the terms thereof petitioner was, with respect to the employees in charge of both trains No. 1 and No. 7, "only justified in continuing in service its train crews up to the time it could, with the exercise of proper diligence, have relieved it," for the reasons:

1. That said Appellate Court expressly found that said train No. 1 and said train No. 7 were both overtaken by casualties and unavoidable accidents before the expiration of sixteen hours, in view of which finding the law—said act of Congress—imposed upon defendant no duty of relieving the crews in charge of said trains either at San Bernardino or at Daggett.

2. That said Appellate Court expressly found that said trains, Nos. 1 and 7, were both delayed before the expiration of sixteen

hours from the time said employees in charge thereof went on duty, as the results or causes not known to defendant, or any of its officers or agents in charge of the respective members of the crews of said trains, when the employes constituting the said crews left their terminal at Las Vegas, which was the commencement of their run, in view of which express finding said act of Congress imposed no duty upon defendant of relieving said crews in charge of said trains, either at Daggett or at San Bernardino, or at any other point short of Los Angeles, which was the destination of said trains, and the final terminal, or end of the run or trip, of the crews in charge thereof.

3. That the effect of said holding and decision gives no effect to the proviso found in section 3 of said act of Congress, but, on the contrary, deprives said proviso of its obvious meaning and intent.

4. That the effect of said holding and decision is to impose upon petitioner duties and requirements in addition to those imposed by the terms of said act, and to subject defendant to penalties in said act mentioned in those cases and under those circumstances when, by its terms, "the provisions of this act shall not apply."

5. That the effect of said holding and decision is to impose upon defendant, arbitrarily and without legislative sanction, the duty of relieving from service employees who are delayed by causes and under circumstances which, by the clear and express terms of said act, toll its operation and render its provisions no longer applicable to such employees.

6. That the effect of said holding and decision is to substitute the construction of the court for the practical contemporaneous construction put upon said act by the administrative body expressly empowered thereby "to execute and enforce its provisions," and also to nullify, set aside and hold for naught, without clear or cogent reasons, the Interstate Commerce Commission's Ruling No. 88, of June 25, 1908, which was promulgated as a rule for the guidance of defendant and other carriers subject to the provisions of the act, and which was reported to Congress as such by said Interstate Commerce Commission.

7. That the effect of said holding and decision is to make an act, which, by the express will of Congress, was clearly not an offense *when* it was performed, an *offense* after it was performed.

ASSIGNMENT VI.

The Appellate Court erred in holding and deciding that subdivision "(i)" of Administrative Ruling No. 287, promulgated by the Interstate Commerce Commission under date of March 16, 1908, modified Administrative Ruling No. 88, promulgated by the same body on June 25, 1908, for the reasons:

1. That said two administrative rulings being necessarily inconsistent, the Appellate Court erred in not giving effect to Ruling No. 88, of June 25, 1908, which was later in point of time;

2. That the Appellate Court's interpretation and construction of subdivision "(i)" of Ruling No. 287, is erroneous;

3. That the Appellate Court should have accepted and applied the Interstate Commerce Commission's Administrative Ruling No. 88, of June 25, 1908, as one of practically contemporaneous construction placed upon the proviso found in section 3 of said act of Congress by the body expressly charged by the terms of said act with its enforcement;

4. The Appellate Court should have held that said Ruling No. 88, of June 25, 1908, was a rule of property and conduct, and should have sustained that ruling as being later in point of time, for the reason that it is necessarily inconsistent with the earlier Ruling No. 287; and for the

further reason that it is the only administrative ruling which the Interstate Commerce Commission in any of its annual reports ever submitted to Congress; and for the further reason that Congress, by inaction, concurred in the interpretation of the proviso to said act so communicated to it by said commission.

ASSIGNMENT VII.

That the Appellate Court erred in holding, by its opinion affirming the judgment of the trial court, that the action of defendant in requiring and permitting the members of the crew of train No. 1 (described in the 3rd, 4th and 5th causes of action of the complaint in case No. 243, Civil), and the members of the crew of train No. 7 (described in the 6th, 7th and 8th causes of action of the complaint in case No. 243, Civil), to continue on duty, and to continue their run to Los Angeles, was in violation of said act of Congress known as the Hours of Service Act, approved March 4, 1907 (34 St. L. 1415), and in holding that said act required that said employees be relieved before their arrival at Los Angeles, for the reasons:

1. That it affirmatively appears from the record which was before said Appellate Court, and from the opinion of said court, that the trains of which said employees were, and each of them was, in charge, had, after starting upon

their runs and before the expiration of sixteen hours, been justifiably delayed by reason of casualties and unavoidable accidents.

2. That it affirmatively appears from the record which was before said Appellate Court, and from the opinion of said court, that the delays to which said trains, and each of them, were subject, were the results of causes not known to defendant, or to any of its officers or agents in charge of said employees at the time said employees left their terminal at Las Vegas, and which could not have been foreseen;

3. That by the express terms of said Hours of Service Act, none of the provisions of said act were applicable to the employees of said trains after the delays so resulting from casualties and unavoidable accidents, and from causes not known to defendant, and which could not have been foreseen at the time said employees left their terminal at Las Vegas, from which they started on their run to Los Angeles.

ASSIGNMENT VIII.

That the ruling and decision of said Appellate Court is contrary to the plain meaning and intent, and to the express provisions, of said act of Congress known as the Hours of Service Act, approved March 4, 1907 (34 S. L. 1415).

Questions of Law Raised by Specifications.

Certain questions of law predicated upon the foregoing specifications are presented to this court for the first time. They are those of far reaching importance, and affect not only the carrier, but its employees also. These questions were urged both in the trial court and in the Appellate Court, and may be stated thus:

1. It is respectfully submitted that there is clear error in the decision of the Appellate Court in this:

(a) It nullifies and deprives of its obvious meaning, and defeats the clear purpose of, that part of the Hours of Service Act providing:

> "Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen * * *"

(b) It imposes upon the carrier, arbitrarily and without legislative sanction, the duty of relieving from service employees delayed by causes and under circumstances which, by the express provisions of said act, toll the operation thereof and render its provisions no longer applicable.

(c) It sweeps away a ruling made by the Interstate Commerce Commission, the body ex-

pressly charged with the enforcement of the law, made June 25, 1908,—a date substantially coincident with the date on which the act took effect—construing the proviso to section 3 of said act, for the benefit and guidance of the carrier and its employees.

(d) It transmutes an act declared by the Interstate Commerce Commission to have been *lawful* at the time it was done, into an offense after it was done.

(e) It makes an act which was clearly not an offense by the expressed will of the Congress *when* it was done, an offense by construction *after* it was done.

(f) It substitutes the construction of the court for the practical contemporaneous construction put upon the act by the body expressly empowered by the act itself "to execute and enforce its provisions."

2. Said decision holds, erroneously, in effect, contrary to the plain and unambiguous language of said proviso that, following a case of justifiable delay within the purview of said proviso, a carrier must provide for and change its crew at the first opportunity where, by the exercise of diligence, it can do so; thereby, in effect, adding the requirement of due diligence to said proviso.

3. Said decision erroneously holds and decides that defendant violated said Hours of

Service Act by requiring and permitting its employees to remain on duty with their trains until the completion of their journey, to-wit, their home *terminal* at Los Angeles, in view of the plain terms of said proviso, and also in view of said Administrative Ruling No. 88 of the Interstate Commerce Commission construing that proviso and positively declaring that any employee delayed by the causes or under the circumstances mentioned in said proviso—

> "* * * may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

and more especially since the court found that the delays which necessitated the excessive hours, were all of them justifiable delays, the court declaring [Tr. p. 160]:

> "* * * all of which resulted in many delays which were beyond the power of the defendant company to prevent, and none of which could have been foreseen by the defendant company at the time such train left Las Vegas, nor could the necessity of the detour have been foreseen."

Said decision, in view of the finding that the delays to said trains were justifiable, held, erroneously, that the act had any application to the employees engaged with said trains.

Condensing the foregoing, the exact question which this court is asked to determine, and which arises on the record here, is:

May a carrier subject to the act, lawfully require or permit a trainman to continue on duty with his train in excess of sixteen hours and until such train reaches the terminal fixed for his usual run, which would generally be easily reached within the sixteen hour limit, but which in a particular case is prevented from arriving within said time by a "casualty or unavoidable accident or the act of God"; or from a cause not known to the carrier or its officer or agent in charge of said employees at the time the latter left his terminal, and which could not have been foreseen?

ARGUMENT.

POINT I.

The Proviso.

"Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time such employee left a terminal, and which could not have been foreseen."

The opinion of the learned Appellate Court, while holding sacred and inviolate the enacting clause of the statute, robs the proviso of its vitality; a result accomplished, the opinion de-

clares [Tr. p. 160] by the application to the statute of the rule announced in *United States v. Dickson*, 15 Pet. 141-163, declaring:

> "The general rule of law which has prevailed, and become consecrated almost as a maxim in the interpretation of statutes, (is) that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reasons thereof."

Conceding the correctness of this rule and its applicability to the statute under inquiry, still, we insist, it cannot rationally have the effect claimed for it in the decision of the appellate court in this case. Conceding that the enacting clause is general in its language and objects, and that the proviso is to be construed strictly, and as so construed takes no case out of the enacting clause not fairly within its terms, and that he who seeks to take advantage of the exception must establish it as being within the words as well as within the reason thereof, still, we insist, the record in the case at bar shows that defendant has brought itself "within the words as well as within the reasons" of the exception.

The Appellate Court having found that [Tr. p. 166]:

"As under the evidence there can be no doubt that the landslide was the direct and necessary cause of the detour of the train in question (train No. 1, counts 3, 4 and 5), and of its numerous delays, *and that therefore the defendant company was entirely justified in continuing in service* its train crew up to the time it could, with the exercise of reasonable diligence have relieved it." * * *

Again, say the court [Tr. pp. 167, 168]:

"What has been above said in respect to counts 3, 4 and 5 of the complaint in case No. 243 in the court below equally governs the proper disposition of counts 6, 7 and 8 of the same complaint,"

necessarily, therefore, defendant, setting up the exception, *established it as being within the words as well as within the reason thereof;* that is, it established, in respect to train No. 1, that it encountered, after leaving Las Vegas, the beginning of the run, a severe storm which caused a landslide which put the line out of commission and compelled the train to be detoured over the railroads of the Tonopah & Tidewater Company from Crucero to Ludlow, and over the railroad of the Santa Fe Company from Ludlow to Daggett, and in respect to train No. 7, that it was necessarily and justifiably delayed at Hesperia because of a wreck on the railroad of the Santa Fe thereat; therefore, it

purged itself of negligence, and established, within the scope of the rule, *supra*, the exceptions found in the proviso, and which, when established, rendered the act inapplicable to those trains and crews; and this in part is the construction placed upon the facts and the law by the Appellate Court, except that it proceeds to devitalize that construction by further holding that the operation of the statute was only suspended *"up to the time it* (defendant) *could, with the exercise of proper diligence, have relieved it* (the crew)." * * * And further [Tr. p. 166]:

"It is plain that the action of the court below in directing a verdict for the plaintiff on counts 3, 4 and 5, must have been based on the view that the defendant company had the opportunity to relieve that crew either at San Bernardino or Daggett, or both, and was by the statute, properly construed, required to avail itself of it; in which view, we think, for the reasons already stated, the court was right." * * *

Now, is not the result of the construction of the learned Appellate Court to engraft upon the statute additional words, such as, "Provided, further, that following any delay resulting from any of the causes herein enumerated, the carrier shall relieve any crew so delayed at the first opportunity where, by the exercise of proper diligence, it can do so"?

The proviso says: "the provisions of the act

shall not apply." * * * The opinion of the Appellate Court declares the provisions of the act do apply when, by the exercise of proper diligence, an opportunity to relieve the crew is presented; and *"proper diligence"* may mean the transportation for long distances to provide relief; and the transportation of relief crews was necessarily introduced in this case, as the test of *"proper diligence"*; since the agreed facts [Tr. p. 82] and the uncontradicted evidence [Tr. p. 91] conclusively established (1) that the relief crews usually maintained at Otis, 4 miles east of Daggett, were sent to and were then actually engaged in clearing the line from the effects of the landslide; (2) that no crews were maintained at Daggett; (3) that no crews other than assigned crews of local trains were maintained at San Bernardino, and that the only source of relief was by shipping a relief crew from Los Angeles to San Bernardino, some 68 miles, or to Daggett, about 160 miles. And, apparently, the court found that it having been possible to ship a crew from Los Angeles to San Bernardino (ordinarily a run of about two and one-half hours) and it not having been done, defendant offended the act.

The proviso contains no words fixing the period during which the act shall not apply, and if it had been the intention of Congress that the operation of the act should be suspended only

until the effect of the cause wore off and ceased to exist, it certainly failed to express it. What it did state was, "The provisions of this act shall not apply," etc. Is there here any need for construction? Is not both the language and its meaning clear?

This proviso performs a more important function than that performed by the ordinary proviso, which is merely to carve out an exception only; this proviso not only carves out the exception, but in addition prescribes a condition which, when it is established, operates to remove entirely the application of the act.

The act itself had no application to either crew until the expiration of the sixteen-hour period—the hour which set it in motion. After that hour had struck no cause could arrest its operation; and, necessarily, the only cause which could have that effect would be one which came into existence before that hour. Such a cause might develop at any time during the sixteen-hour period; the first minute of the first hour, or the last minute of the last hour; but not afterwards, and which when it should occur and be productive of delay, would defer the application of the act, as the sixteen-hour period—the thing which sets it in motion is never reached. It is not the happening itself—the cause—but the delay which it entails which puts off the statute. This seems clear from the words "nor

where the delays," etc., as indicating an intention on the part of the Congress to make the act inapplicable to excess hours resulting from causes beyond the power of the carrier to prevent. Logically, therefore, in any such case of excess hours, the act never applies. It is as though the statute were nonexistent. More than a case of suspension, it is a case in which there is nothing to suspend.

The opinion concedes that at the time the crew reached Daggett—although at that time it had been on duty more than sixteen hours—the act had not pressed down upon them, had not been infringed. This being true, did the act go into effect again until the expiration of the ensuing sixteen-hour period measured from the time the crew reached Daggett? If it did not, the crew reached their terminal, Los Angeles, long before that time. If the act did not apply to that part of the trip to Daggett, could it again apply until the expiration of sixteen hours thereafter?

Will the power of Congress to grant the exception contained in the proviso be questioned? Prior to the passage of the act, so far as the government was concerned, a train crew could have been lawfully kept on duty indefinitely. By the passage of the act was it not clearly the intention of Congress to give the same latitude to the carrier in all cases of unavoidable and

unpreventable accident, in all cases of calamitous visitations brought about from causes beyond its control? Surely, Congress did not have in mind when it absolved the carrier from compliance with the act in cases of calamity, the finely spun theories of the government which, if admitted, would destroy the humanitarian intent disclosed by the proviso. To say that, in those cases enumerated by the proviso, the carrier must at its peril relieve the crew, is not only to destroy the efficacy of the proviso, but as well to amend it.

POINT II.

Conditions which Remove the Application of the Statute.

The proviso discloses two independent sets of circumstances, the existence of either of which tolls the statute, viz.:

1. Those cases where the excessive hours are the result of casualty or unavoidable accident or the act of God. This may be said to apply to all service embraced by the act.

2. Those cases of delay resulting from unanticipated or unforeseen, and unforeseeable and unpreventable causes arising after the employee has left his terminal on his usual trip or run whereby he is unable to complete his run within the sixteen-hour period.

The first set of circumstances is characterized by the use of the semicolon; the second by the words following it; and while it is not necessary that both operate conjunctively, they may and frequently do so.

If there remain any room to doubt whether Congress in enacting the proviso, intended to convey any different meaning than that for which we here contend, we may then rely, as squarely supporting our contention, upon those well recognized sources of information which may also be resorted to for the purpose of discovering the meaning in cases where the language of the statute admits of more than one construction, namely:

(1) The punctuation taken in conjunction with the words incorporated in the proviso as finally enacted;

(2) The debates in Congress and the various amendments proposed during the progress thereof to the bill as originally introduced as a means of ascertaining the history of the period, the surrounding circumstances, and the defects which it was the object of the law to remedy;

(3) The practical contemporaneous executive construction placed upon the language of the proviso by the administrative body to which the execution and enforcement of the act was

expressly delegated, and long relied and acted upon by those for whose guidance it was promulgated;

(4) The acquiescence of Congress in, and its acceptance of, the only executive construction of the proviso ever communicated to it by the Interstate Commerce Commission;

(5) The absence of any authoritative judicial construction whereby Congress could have been influenced; and,

(6) The adoption by Congress of the construction placed upon the proviso by the Interstate Commerce Commission, and reported by said commission to Congress, by re-enacting without change the exact words of the statute which had previously received a long continued executive construction, and which had not received any authoritative judicial construction.

We realize that this court has said "punctuation is a most fallible standard by which to interpret a writing," and while we concede that it is subordinate to the text, and will not control the plain meaning of the statute, still, in cases of doubt, and especially "when all other means fail" it may be resorted to, and should operate as an aid to construction and interpretation.

Ewing's Lessee v. Burnett, 11 Pet. 41 (54), 9 L. Ed. 624 (630);

United States v. Three Railroad Cars, 28 Fed. Cas. (No. 16,513);

Blood v. Beal (Me., '05), 60 Atl. 427 430);

Taylor v. Carribou (Me., '07), 67 Atl. 2, (4);

Tyrrell v. Mayor et al. (N. Y., '99), 53 N. E. 1111 (13).

In the case last cited it is said:

> "The punctuation, however, is subordinate to the text and is never allowed to control its plain meaning, but, when the meaning is not plain, *resort may be had to marks, which for centuries have been in common use to divide writings into sentences, and sentences into paragraphs and clauses, in order to make the author's meaning clear.*" (Our italics.)

The punctuation used in the proviso in question is of material aid in learning the intention of Congress and because the semicolon is so used as to enable the language employed to bear an interpretation which will make the whole statute rational and self-consistent it is entitled to consideration as much as the language itself.

According to Standard Dictionary, the semicolon is:

> "Used in English to indicate a separation of relations of the thought a degree greater than that expressed by the comma."

Webster's Dictionary says that the semicolon is:

> "Used to indicate a separation between parts or members of a sentence, more distinct than that marked by a comma and a pause in reading usually of longer duration."

Century Dictionary and Encyclopedia, at page 5483, says of the semicolon:

> "It is used to mark the division of a sentence somewhat more independent than that marked by a comma. * * *"

In *Lambert v. People*, 76 N. Y. 220 (225), it is said:

> "According to well-established grammatical rules, a semicolon is a point only used to separate parts of a sentence more distinctly than a comma."

As was said in the case of *Taylor v. Caribou (supra)*:

> "There is no reason why punctuation, which is intended to and does assist in making clear and plain the meaning of all things else in the English language should be rejected in the case of interpretation of statutes * * * if by it the meaning may often be determined. * * * It is one of the means of * * * and may be of material assistance in determining the legislative intention. * * *"

It is manifest, therefore, that Congress clearly intended that the first part of the proviso must

be read just as if it ended with the words "act of God," and that if it be established in any case, either (1) that an employee is prevented by any casualty or unavoidable accident or act of God from completing within sixteen hours any trip upon which he started before the happening thereof; or (2) that any delay which, preventing the completion of such trip within sixteen hours, is the result of any other cause which was not known to the carrier or its officer or agent in charge of such employees at the time said employee left a terminal—started on such trip or commenced his run—and which could not have been foreseen *then and in either of such events all of the provisions of the act cease to apply to such employee, who may, therefore, complete his journey without subjecting his employer to the penalties of the act.*

The effect of according to the proviso any other construction is not only wholly to change the meaning of the words which Congress saw fit to employ but also to deprive the semicolon of meaning and to rob it of force and effect.

The word "terminal" or the phrase "left a terminal" cannot be carried back to modify that part of the proviso preceding the semicolon without doing violence to all recognized rules of grammatical construction.

The statement that *"the provisions of this act shall not apply in any case of casualty or un-*

*avoidable accident or act of God, * * **" stands without any qualification or modification. The word "terminal" has no reference to nor connection with the words "casualty" or "unavoidable accident." It has reference only to such delays as are the result of a cause not known to the carrier or to its officers or agents at the time said employee left a terminal and which could not have been foreseen. It is impossible to connect the phrase "left a terminal" with the first part of the proviso; otherwise, it would be impossible to make any application of the proviso to the case of a telegraph operator or train dispatcher.

It was expressly held by the Circuit Court of Appeals for the Eighth Circuit that the proviso applies to the service of operators, for in the case of *United States v. Mo. Pac. Ry. Co.*, 213 Fed. 169, that court, per Mr. Justice Sanborn, at pages 172-173, said:

> "The expressed terms of section 3 make every common carrier liable for a penalty of $500 for every violation of section 2, and declare that none of the provisions of the act shall apply in any case of casualty, unavoidable accident or the act of God. If none of the provisions of the act apply in any case of casualty, unavoidable accident or act of God, then the provisions of the act which prohibit the service of telegraph operators and train dispatchers * * * do not apply in such cases, and so it is that

the unambiguous terms of the act expressly declare that the limitations of the hours of service of telegraphers and train dispatchers in section 2 have no application in any case of casualty, unavoidable accident or act of God. * * *"

In the case of *United States v. K. C. So. Ry. Co.*, 202 Fed. 829 (834), the same court held that while delays due to causes usually incidental to operation "are not, standing alone, valid excuses within the meaning of this proviso, the carrier must go further and show that such delay could not have been foreseen and prevented by the exercise of the high degree of diligence demanded," from which it follows that if, as was done in the case now under review, it be shown that the cause of delay could not have been foreseen, then the proviso excuses all excess service thereby caused.

Clearly it was within the power of Congress "to prohibit the application of all or of only part of the provisions of the act in cases of casualty, unavoidable accidents and acts of God"; but Congress made no exception and the rule, without question, is that where a legislative body makes no exception to a general and clear declaration of its will it will be conclusively presumed that it intended to make none, and it is not the province of the court so to do.

De Yturbide v. United States, 63 U. S. (22 How.) 290;
Maxwell v. Moore, 63 *Id.* 185.

This reasoning is in harmony with the expressions of this court in two cases construing the act under consideration.

In *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612 (620), this court, in referring to provisions of the act controlling the service of telegraph operators which it was claimed was unconstitutional for lack of certainty, said:

> "Nor does the contention gather strength from *the broad scope of the proviso* in section 3, for if the latter, *in limiting the effect of the entire act*, could be said to include everything that may be embraced within the term 'emergency' as used in section 2, this would *be* merely a duplication and would not invalidate the act." (Italics ours.)

Our view as to the effect and meaning of the proviso is further supported by the decision of this court in the case of *Missouri, K. & T. Ry. Co. v. United States*, 231 U. S. 112, wherein it was urged that in one of the consolidated cases the delay was the result of a cause, a defective injector, that was not known to the carrier and could not have been foreseen when the employees left a terminal and that, therefore, by the proviso in section 3 the act did not apply but, in refraining from considering the question because it had been raised by a motion to direct a verdict for defendant, this court said, "*the*

trouble might have been found to be due to the scarcity and bad quality of the water, which was well known."

In other words, the affirmative defense had not been established, but as we read this decision if such affirmative defense has been established, as it was by both the stipulation and the evidence in the case at bar, then it would have been held that the service had been justified.

In this view of the law an adjudication of the meaning of the word "terminal," as used in the proviso, while urgently desired by carriers subject thereto, including defendant, is not essential to a determination of the questions here involved because the agreed facts, the evidence, and the express finding of the court as reflected in its opinion, is that the delay to each train of defendant was due to a casualty or unavoidable accident or the act of God, and also to causes not known and which could not have been foreseen when the crews respectively started from Las Vegas; and, in view of these things, it is manifest that none of the provisions of the act would be held to apply to the trips respectively.

POINT III.

"Terminal."

The rule is well established that whenever a statute uses words or phrases which are technical they must be interpreted in accordance with that meaning or acceptation accorded to them by those learned in the trade to which they belong, unless it clearly appears from their context or otherwise, that the legislature intended to use them in a different sense.

The word "terminal," as used in the proviso in section 3 of the Hours of Service Act, has a commonly understood and accepted meaning among railroad men throughout the United States, and it was set forth in the stipulation as to facts in the companion case in this court entitled A. T. & S. F. Ry. Co. v. U. S. [Tr. pp. 26-27], and the trial court found in that case that it means the beginning *or* the end of the employee's run—

> * * * "the point at which in the regular course of business he would go on duty as a member of a particular crew or at which * * * he would cease to be a member of such crew * * * and be relieved from duty * * * the point at which he becomes a member of a train crew * * * and the point to which it was intended at the time * * * that he should accompany such train."

The foregoing positive definition is coupled with the express stipulation and finding setting forth as a negative definition,

> "that it is not generally understood among railroad men that the word 'terminal' as applied to any particular train or crew refers to a relay or division point between the point at which an employee became the member of a crew and the point to which it was intended that he should accompany the train as such member, although such intermediate relay or division point may have been the point of departure, the end of the run or the terminal for other crews and other trains."

If, notwithstanding the above stipulated definitions there still remains any doubt as to the meaning of the proviso, then, as this court, through Mr. Justice Brewer said, in *Smith v. Townsend*, 148 U. S. 490 (494), 37 L. Ed. 534:

> "It is well settled that where the language of a statute is in any manner ambiguous or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy."

It is impossible successfully to deny that where Congress passes a statute dealing with railroads and especially dealing with trainmen employed by such railroads; and in the act expressly imposes upon a commission, whose business it is to deal with railroads, the duty "to

execute and enforce the provisions of this act," then the word in question is to be taken in the sense which custom and usage have thus given to it.

Ex parte Hall, 18 Mass. (1 Pick.) 261;
Green v. Weller, 32 Miss. 650;
Quigley v. Gorham, 5 Cal. 418.

That definition of the word "terminal" as used in the act as stipulated to and incorporated in the findings of the trial court is in strict accord with the intent of Congress in its use in the proviso, will appear by reference to those parts of the Congressional Record which reflect the debates upon and the various amendments to the bill originally introduced.

The rule that congressional debates may not be used as a means to an interpretation of an act of Congress is not violated by referring thereto for the purpose of ascertaining the history of the period when the statute was adopted or as a means of determining conditions which the statute was designed to remedy for, as was said in this court in *Standard Oil Company v. United States*, 221 U. S. 1 (50), 55 L. Ed. 619 (642):

> "Although debates may not be used as a means for interpreting a statute * * * that rule, in the nature of things, is not violated by resorting to debates as a means of ascertaining the environment at the time

of the enactment of a particular law; that is the history of the period when it was adopted."

POINT IV.

Purpose of the Proviso.

A carefully prepared statement showing the various amendments proposed to the Hours of Service Act as originally introduced and remarks which clearly indicate that the object of Congress was to permit crews delayed en route by causes specifically mentioned to complete the journey or trip upon which they had started is submitted as an appendix hereto and is respectfully commended to the attention of the court with the request that it receive the same consideration as though here set forth at length.

The clear purpose of the proviso was to incorporate into the law some clause, which without enumerating all contingencies to which it was recognized that railway operations were subject, would expressly authorize crews which, after starting upon their run, met with casualties or unavoidable accidents or encountered delays as the result of causes which were not known and which could not have been foreseen before the crews started to complete the runs thus commenced to the point for which they had started without subjecting their employer to the penalties of the act. It is obvious that that was

the sole object and purpose of the language employed for it is impossible to conceive of any other object, otherwise there would have been no occasion whatever for the proviso. Had Congress intended that crews delayed by the causes mentioned be relieved as soon as possible thereafter it would have so stated.

To insure adequate rest after protracted service was fully as much the object of the law as was the prevention of excessive continuous service and it is clear that Congress recognized that conditions too numerous to detail might arise which would at times prevent trainmen from completing their runs within sixteen hours, but that the necessities of railroading and the best interests of the employees both justified a provision which would permit crews to finish the runs upon which they had started, providing an adequate period for rest and recuperation was insured to employees who, by reason of casualties and causes not known when they started upon their runs, were necessarily subject to service more protracted than could have been anticipated.

The statute was passed in view of the practical operation of railroads and should receive a practical and reasonable construction. As shown in the appendix hereto, setting out the proceedings in Congress, that body well understood that, with respect to trainmen, each crew had a

designated run at each end of which the members thereof would arrange for accommodations for resting, etc. Therefore, it was well understood that such run ought not to be interfered with or covered by the provisions of the act in exceptional cases of casualty, unavoidable accident, or act of God; nor in case where a delay in the usual operation of the train was caused by something unforeseen by officials in charge of the crew and which could not have been prevented when the crew started on its journey. Such instances would not be frequent. The purpose of the law was not to make radical changes in the methods and rules adopted upon first-class railroads, but rather to prevent departures therefrom in cases not reasonably warranted.

Thus in the committee's report to the house of representatives, made by its chairman, Mr. Esch, upon the bill which finally passed both houses (report No. 7641, 59th Congress, second session), it is stated, quoting first from the 1904 Report of the Interstate Commerce Commission:

> "There are a few roads that have stringent rules to guard against the overworking of trainmen, but in most cases the matter is left entirely to the discretion of the man and to subordinate officials immediately in charge. These subordinate officials, in their eagerness to keep traffic moving frequently overtax the men, and in many cases

the men themselves, through greed for making big pay, willingly remain on duty for excessive periods of time."

There is then quoted from the 1905 Annual Report of the Interstate Commerce Commission, as follows:

"The need of a high standard in this respect and of care on the part of supervisory officers to see that proper regulations are maintained and obeyed is quite generally recognized, and a considerable number of railroads have prescribed rules limiting the hours of work and providing suitable rest periods; but these rules often appear to be very poorly enforced.

* * * * * * * *

"The disposition of men to work beyond reasonable limits of physical endurance for the sake of facilitating the business of the railroad or to increase their earnings may be seen in other departments than the train service. Signalmen, who usually work regular turns of twelve hours each, sometimes take each other's places in cases of sickness or an unexpected call of a man away from his home, and thus remain on duty thirty-six hours at a time." (Pp. 3 and 4.)

It is then stated in the committee's report:

"Although this bill makes into law agreements now existing between the companies and the various brotherhoods and makes as the maximum of continuous service that which now is left for the most part to the wish or consent of the employees themselves, the old and oft-repeated argument was made that the business of railroads was

private business, and hence ought not to be subjected to legal restraints," etc.

After referring to the rest rules of certain railroad companies mentioned, the report continues on page 7:

"More rules of like character on important railways of the United States might be given, but these rules seem to be of the same general character, leaving the matter of excessive hours largely, if not entirely, in the discretion of the men themselves. * * * Under the present system of agreement between the companies and the brotherhoods, by the terms of which it is largely discretionary with the employee as to whether he shall work hours in excess of his contract or not, traffic managers or those responsible for transportation do not hesitate to discipline men who invoke the aid of their contract in support of rest when called upon to perform excessive hours of labor, and it is the fear of being disciplined and ultimately of being discharged that makes many men work to excess.

"The passage of the pending bill will, on the one hand, permit the railroad companies to defend themselves against the cupidity of some of their employees who desire to work excessive hours for the sake of an increase in their earning, and on the other hand, will permit the employees to protect themselves against being disciplined or discharged because of a demand made upon them to work excessive hours."

Congress was legislating with reference to existing conditions. In using the word "ter-

minal" as applied to trainmen it knew that their run was between two points called "terminals," at which places they had appropriate arrangements for rest, etc. They would be greatly inconvenienced by being required to stop off at some intermediate point for rest where no arrangements therefor were made.

In providing "when such employee left a terminal," etc., Congress had in mind a terminal or point out of which the particular crew would start on its run to the other terminal. It did not mean *any* terminal, which, due to any accidental junction of lines or branches, might be created intermediate to accommodate crews running on other lines or between other points. "A terminal" meant that of the particular crew. The sentence in which it is used has reference to a train crew and the delay thereof.

Daggett was not a terminal of defendant for any purpose, and San Bernardino was a terminal only for crews of local trains running between that point and Los Angeles.

POINT V.

The Construction Accorded by Interstate Commerce Commission to the Proviso.

As before stated, the Interstate Commerce Commission, on June 25, 1908, promulgated its Administrative Ruling No. 88, in which it de

clared, after quoting the proviso in full, that "any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

This construction the commission, in its 22nd Annual Report, reported to Congress, using, in connection therewith, the following language:

> "Employees unavoidably delayed by reason of causes that could not at the commencement of the trip have been foreseen, may lawfully continue on duty to the terminal or end of that run." (I. C. C. 22nd Ann. Rep., p. 50.)

It will be seen, therefore, that the language last above quoted was substantially identical with the language found in Ruling No. 88.

The fact that the commission in its report to Congress next following the effective date of the act, embodied its construction of the proviso (as found in Ruling No. 88), and also criticised the proviso, suggesting "that Congress should by a few lines of explanation so clarify the situation as authoritatively to settle most of the questions that may arise," and recommending "that the commission's authority in respect of the enforcement of the hours of service law be made more definite," considered in connection with the omission of Congress to adopt the suggestions and recommendations of

the commission, is eloquent of the proposition that Congress approved and adopted the interpretation essayed by the Interstate Commerce Commission, and brings the matter within the rule announced in *Heath v. Wallace*, 138 U. S. 573, 34 L. Ed. 1068, and followed by a long line of cases decided by this court, providing:

> "Moreover, if the question be considered in a somewhat different light, viz.: as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons."

The rule thus announced is reiterated in numerous cases, including:

Pennoyer v. McConnoughy, 140 U. S. 1-25;

Brown v. U. S., 113 U. S. 568, 574;

U. S. v. Moore, 95 U. S. 760;

U. S. v. Ala. R. R. Co., 142 U. S. 616;

U. S. v. Corecede, 209 U. S. 377.

In *Pennoyer v. McConnoughy, supra*, the court said:

> "The principle that a contemporaneous construction of a statute by the executive

officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up, which ought not to be ruthlessly swept aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."

In *United States v. Moore, supra,* this court said:

"The construction given to a statute by those charged with the duty of executing it, is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons (citing *Edwards v. Darby,* 12 Wheat. 210; *U. S. v. Bank,* 6 Pet. 29; *U. S. v. McDaniel,* 7 Pet. 1). The officers concerned are usually able men, and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

In this case the membership of the commission was composed in part of eminent lawyers.

In *United States v. Finnell,* 185 U. S. 236, 46 L. Ed. 890, this court, at page 244, said:

"Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. * * * But if there simply be a doubt as to the soundness of that construction—and that is

the utmost that can be asserted by the government—the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. * * * Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interest."

In *United States v. Johnson*, 124 U. S. 236, 31 L. Ed. 389, it is said:

"In view of the foregoing facts the case comes fairly within the rule, often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

To the same effect is *Brown v. United States*, 113 U. S. 568, 28 L. Ed. 1080, wherein it is declared:

"It must be conceded that were the question a new one, the true construction of the section would be open to doubt. But the findings of the court of claims show that soon after the passage of the act the president and the navy department construed the section to include warrant as well as commissioned officers, and that they have since that time uniformly adhered to that construction, and that under its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform

interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale. In *Edwards v. Darby*, 12 Wheat. 206, it was said by this court that, 'in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect.' This case is cited upon this point with approval in *Atkins v. Disintegrating Co.*, 18 Wall. 301, 21 Law. Ed. 844; *Smythe v. Fiske*, 23 Wall. 382, 23 Law. Ed. 49; *U. S. v. Pugh*, 99 U. S. 265, 25 Law. Ed. 322, and in *U. S. v. Moore*, 95 U. S. 763, 25 Law. Ed. 589. In the case last mentioned the court said that 'the construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret.' And in the case of *U. S. v. Pugh*, the court said: 'While, therefore, the question, "the construction of the abandoned property act," is one by no means free from doubt, we are not inclined to interfere at this late day with a rule which has been acted upon by the court of claims and the executives for so long a time' (citing cases). These authorities justify us in adhering to the construction of the law adopted by the executive department of the government and are conclusive against the contention of appellant that section 23 did not apply to warrant officers."

It is well understood that the reasons influencing Congress whereby was allowed one year between the passage of the act and the taking effect of the act, was to permit the carriers affected by its provisions to effect a rearrangement of their "terminals," as that word is found in the act, or other facilities; or to make any other readjustment which might be necessary in order that the runs of trainmen might fit the prescribed sixteen-hour limit.

This was recognized in *No. Pac. R. Co. v. Washington*, 222 U. S. 370, 56 L. Ed. 237, where this court, through Mr. Justice White, at page 379, said:

> "In the second place, the obvious suggestion is that the purpose of Congress in giving time was to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act —a purpose which would of course be frustrated by giving to the provision as to postponement a significance which would destroy the very reason which caused it to be enacted."

The commission knew, of course, when it promulgated its Ruling No. 88, of June 25, 1908, that carriers subject to the act had, during the year allowed for that purpose, established exclusive relay points for engine crews, for freight crews, and for passenger crews, and for local as well as through passenger crews, and that

they had so arranged the runs of their crews as to secure compliance with the act, and there is not one word in any ruling of the commission indicative of any desire or intention on its part to disturb the arrangements and readjustments so made.

The circumstances in and of themselves strongly suggest that the commission had these conditions in mind when it promulgated its first ruling of March 16, 1908, in which, after referring to the instances enumerated in the proviso, said:

> "They serve to waive the application of the law to employees on trains only until such employees so delayed reach a terminal or relay point."

It is also strongly suggested that the ruling of March 16 was so obviously in contravention of the plain words of the proviso, that that was the reason the commission never saw fit to report it to Congress, and was also the reason why it was later superseded by Ruling No. 88, of June 25, 1908, with which it cannot be harmonized.

If we admit that the two rulings are *in pari materia*, they are, therefore, under well settled principles of construction, to be considered together and effect given to each, if possible. If, however, they are conflicting and inconsistent, then, upon the same principle, to the extent of

the inconsistency, the later declaration must prevail.

Tested by this rule, what is the result? If it be insisted that the necessary effect of the prior construction was to require the carrier to relieve the crew at any point short of the end of the run, certainly a reasonable construction, then, to that extent, it is in hopeless antagonism to, and irreconcilable with, Ruling No. 88—the later ruling. The twain cannot stand, one must go, and that one the prior ruling.

Precisely what was the determination of the learned Appellate Court upon these two rulings considered together, is not disclosed by the opinion. All that the opinion states is:

> "That ruling (June 25, 1908) must be read and considered with the preceding ruling of the commission of March 16, 1908, and must also be read and considered in connection with the action of the commission shown by the record in this case, that the suit was directed to be brought by the attorney general at the request of the Interstate Commerce Commission."

We agree with the learned Appellate Court that if the prior ruling was not actually abandoned and repudiated, the two rulings must be read and considered together, and thus agreeing, we ask in all candor, what is the logical effect, if it be not that already stated?

As to the other phase of the matter suggested

by the opinion, which refers to the bringing of the action by direction of the attorney general at the request of the Interstate Commerce Commission, all the information we have is derived from the complaint, which alleges: "This action being brought upon the suggestion of the attorney general of the United States, at the request of the Interstate Commerce Commission, and upon information furnished by the commission." This means no more than that the action is brought at the request of the commission upon information furnished by it with the consent of the attorney general. The language does not import that the attorney general as the result of an independent examination of the act, has disapproved the commission's construction embodied in its Ruling No. 88; rather, it means, that the action was begun and is being maintained by the direct request of the commission, and that the commission is sponsor for it.

Adopting this view, it is strongly suggested that the commission, by the commencement and maintenance of this action, has broken away from its own rule—the rule of reason. Of course, it had heaven's license to err, and heaven's license to correct the error, if error there was, but we humbly submit whether the commission should not have renounced its error in the same formal fashion that it published its

ruling, and in that way and in that manner afforded the carriers an opportunity at least to offend wittingly.

The first, and in fact, the only notice given by the commission to defendant that it had renounced its rule of reason, was the commencement of this action. Because it accepted and relied upon Ruling No. 88, and shaped its conduct with reference to it, ought defendant to suffer in its good name and be deprived of its property? What defendant did was not, at the time it did it, under the rule, an offense. Under that rule its defense was complete.

That the position of counsel may not be misapprehended or misunderstood, we are not before this court to contend for a moment that the judicial power does not extend to a sweeping obliteration of any contemporaneous or executive construction of a statute, or any part thereof. And the fact that such construction may have received the sanction of ages would not of itself defeat or lessen the dominion of courts over the interpretation and construction of statutes. That is a function, a prerogative, a power so inherent that it cannot be questioned. It is this very power which in time of stress, not only gives protection to the citizen and subject, but also stability to the state.

Whether the commission's construction of the proviso in question was in accord with the lit-

eralism thereof, is not so much the question with us as is the fact that such views were contemporaneously pronounced by the body of experienced men to whom was committed the power to execute the law. If the advice and opinions of such men were not intended to be of primest importance and significance to all those subject to the operation of the law, then it is to be said that the Congress made a mistake in committing to them an authority so comprehensive and so vast.

POINT VI.

Judicial Construction.

The precise question here presented for adjudication is presented to this court for the first time. While the Hours of Service Act has been before this court, and before the Circuit Courts of Appeal many times, in no case, so far as we have been able to discover, has the identical questions involved here been presenttd for decision. The nearest approach to it was by the Eighth Circuit Court, in the case of *United States v. Kansas City Southern Ry. Co.*, 202 Fed. 828. But, while the proviso to section 3 was discussed in that case, it was not invoked by the defendant on the ground of delays resulting from unavoidable accident or the act of God, such as unanticipated storms and land-

slides. In that case the carrier sought to excuse itself under that part of the proviso which excuses the carrier, namely: "Where the delay is the result of a cause not known * * * at the time said employee left a terminal, and which could not have been foreseen." But the substantive defenses there presented were substantially these: (1) The steaming qualities of the engine coal; (2) the leaky flues of the engine, and (3) the defective shaker rod for cleaning the engine grates. Such defenses may be classified as those purely economic. They relate only to maintenance, equipment and service conditions; and to keep up the necessary standard in that behalf, the carrier is necessarily held to a high degree of care and diligence, and the Appellate Court in that case held that the carrier under those defenses had fallen short of the essential proof that it had "taken sufficient precaution to see that its engine was in proper condition when it started, and whether the delays which occurred were the result of causes which could not have been foreseen by the exercise of necessary diligence and foresight." That case, therefore, throws but little light upon the question involved here. The question here involves nothing of railroad economics, of defective engines, bad coal, impaired appliances, and defective trains or cars. Concerning all these things, diligence and foresight are cardinal

duties of the carrier. But "diligence and foresight" do not enter into the questions at bar. The question here is purely one of physical fact and visible result. That question is, was the delay the result of a landslide not known, and which could not have been foreseen when the crews left Las Vegas, the terminal, and which question, as already stated, is answered by the agreed facts, the uncontradicted evidence, and the findings of the court. Neither the storm nor the landslide could have been anticipated or avoided by the exercise of due diligence and foresight, nor even, indeed, by the highest degree of such human qualities.

The proviso has been construed by the Circuit Court of Appeals for the Ninth Circuit in the case of *U. S. v. Nor. Pac. Ry. Co.*, 215 Fed. 64. In that case, after having found that the delay was the result of an unavoidable accident, a cause which could not have been foreseen, the court expressly held that the existence of the cause justified the carrier's failure to relieve the crew so delayed, although it was well known before they started upon their return trip that they could not complete their run without infracting the provisions of the second section of the act. That decision, and the decision of that court in the case at bar, are in apparent hostility.

The case of *U. S. v. A. T. & S. F. Ry. Co.*, 212 Fed. 1000 (and now pending in this court on *certiorari*, being No. 267, and where the same questions are involved as in the case at bar), is a well reasoned case, which upholds the contentions of defendant herein presented.

In the Missouri Pacific case, *supra*, the court expressly holds that the proviso exempted carriers from liability for penalties when, in cases of casualty or unavoidable accident they permit operators to remain on duty in excess of the period prescribed by section 2 of the act. The opinion states:

> "Congress had the right and power to prohibit the application of all or of only a part of the provisions of the act in cases of casualties, unavoidable accidents, and the acts of God. It enacted 'that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God,' and it made no exception. The construction for which counsel for the government contends requires the amendment of this prohibition by the interpolation of an exception therein so that it will read:
>
> "'That the provisions of this act, except those in section 2, which relate to the hours of service of the operators and train dispatchers and others of their class, shall not apply in any case of casualty, or unavoidable accident or the act of God.'"

The opinion further states:

"It is conceded that carriers and all their employees, except operators, train dispatchers, and members of their class, are exempt from the limitation of their hours of service in every case of casualty, unavoidable accident, or act of God. But it is more important, more essential to the protection of the safety and welfare of travelers and employees in cases of this character, that carriers and their telegraph operators should be relieved from the restrictions of their hours of service than that carriers and their other employees should be thus relieved. * * * A flood may wash out a bridge, a landslide may cover a railroad track with rocks and earth, a rail may break, and a railroad wreck may occur within a few minutes of the end of the 17 hours which marks the utmost limit of the service permitted an operator under section 2 of the act. Passenger trains and freight trains may rush towards the wreck, the lives, limbs, and suffering of men and women at the wreck, the stoppage of trains, and the prevention of greater injuries may be at stake on the continued service of the operator for many hours. It is incredible that the Congress intended to prohibit, or did prohibit, such extended service by operators, train dispatchers, and others in their class in cases of such casualties and unavoidable accidents. *The object of the statute, the safety of travelers and employees, the necessities of the cases of railroad casualties and accidents, the demands of humanity, and a rational and practical interpretation of the statute converge with compelling force to convince that the Con-*

gress intended what it expressed, that 'the provisions of this act,' all the provisions of the act, those relating to the hours of service of telegraphers and train dispatchers, as well as those relating to the hours of service of other employees, 'shall not apply in any case of casualty or unavoidable accident or the act of God.'" (Italics ours.)

And further:

"There is still another rule of construction that persuades to the same conclusion. This is a suit for the collection of a penalty of $500 for a violation of this act of Congress. The act created and denounced a new offense. A statute which creates a new offense and prescribes its punishment must clearly state the persons and the acts denounced. An act which is not clearly an offense by the expressed will of the legislative body before it was done may not be lawfully or justly made by such construction after it is committed, either by the interpolation of expression, or by the expunging of its words by the judiciary. And as this statute not only failed clearly to denounce as an offense requiring or permitting an operator or train dispatcher to serve beyond the hours limited in section 2 in case of a casualty, an unavoidable accident, or the act of God, but positively declared that in such a case the provisions of the act which denounced such excessive service, as an offense did not apply, the defendant may not lawfully be punished for such an act." Citing: *U. S. v. Wiltberger*, 18 U. S. (5 Wheat.) 76, 96, 5 L. Ed. 37; *U. S. v. Ninety-nine Diamonds*, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; *First Nat. Bank v. U. S.*, 206 Fed. 374,

376, 124 C. C. A. 256, 46 L. R. A. (N. S.) 1139.

In no case save that under review has any court which has been called upon to construe the proviso undertaken to read out of the statute that which Congress saw fit to incorporate or to read into the statute provisions which Congress had not included therein. The statute contains no words which can properly be construed to require a carrier to relieve a crew delayed by one of the causes enumerated in the proviso, and, as was said by this court in *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940:

> *"When a provision is left out of a statute either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe."*

Particularly applicable here is the language of Mr. Justice Brewer in answer to an argument based upon the consequences of an act of Congress against the meaning expressed by its words in *United States* v. *Goldenberg*, 168 U. S. 103, 42 L. Ed. 398:

> *"No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."*

POINT VII.

Legislative Construction.

It cannot be argued successfully that the subsequent re-enactment by Congress of the proviso without change in wording was induced or influenced in any way by any judicial construction of the act because:

First. The decisions of the Circuit Court of Appeals of the Ninth Circuit were not harmonious, as we have shown;

Second. The decisions of the Circuit Court of Appeals of other circuits were not in accord with that in the case under review, as has been pointed out; and

Third The question involved had never been passed upon by this court, in which this cause and another involving identical questions were pending at the time of such amendment.

Re-enactment After Executive Construction.

It cannot be denied that whenever a statute which has received a practical construction by an executive department of the government has been re-enacted in the same or substantially the same terms, the legislative body is presumed to have been familiar with and to have adopted such construction as a part of the law unless

it expressly provides for a different construction.

By an act of Congress approved May 4, 1916 (S. 3769—Pub. 68), section 3 of the Hours of Service Act was re-enacted *without change in the wording of the proviso under consideration* to provide, in accord with a recommendation of the Interstate Commerce Commission, for a minimum penalty of $100 for each violation.

The only construction of the proviso which the Interstate Commerce Commission *ever* reported to Congress was that *"employees unavoidably delayed by reason of causes that could not, at the commencement of the trip have been foreseen, may lawfully continue on duty to the terminal or end of that run."*

This court, in the case of *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361 (402); 50 L. Ed. 515 (525), had occasion to consider certain rulings of the Interstate Commerce Commission bearing upon the construction of certain provisions of the Interstate Commerce Act and the court, through the present chief justice, Mr. Justice White, there said:

> *" * * * without reviewing the rulings made by the Interstate Commerce Commission in these cases and which have been adhered to by that body during the many years which have followed those decisions, we concede that the interpretation*

*given by the commission in those cases to the act to regulate commerce is now binding. * * * We make this concession because we think we are constrained to do so, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which practical construction has long obtained in practical execution and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."*

Thereafter, in *Copper Queen Consol. Min. Co. v. Arizona*, 206 U. S. 474, 479; 51 L. Ed., 1143, 1146, it was said:

*" * * * when, for a considerable time, a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed."*

We submit, therefore, that Congress not only by refraining from amending the act, but also by re-enacting the proviso without change, accepted a construction of the act with which it is impossible to reconcile the judgment under review, and which construction by the body possessed of full executive functions over the act, became virtually the law of the land, and, until the institution of this suit, stood as a guide

and protection to all persons embraced by the act.

In conclusion we respectfully submit that if the judgment under review is permitted to stand, its effect will be to unduly dignify the enacting clause at the expense of the proviso, and to work a nullification of the latter, despite the fact that both are begotten of the same will; to justify judicial addition to the language of the statute and to supply language omitted from it; to make carriers, amendable to the act, insurers against service of its employees in excess of sixteen hours, regardless of causes or necessities; to compel them to readjust their carefully planned arrangements for the operation of their trains with reference to compliance with the act, and to the extent that they will be compelled at enormous expense to have available at all times, and at new and additional points, sufficient extra train and engine crews to provide for unanticipated contingencies, such as inevitable accident or the act of God; to require them to know the whereabouts of trains which mayhap be overtaken by a cause which may also be the cause of putting its wire lines out of commission; to make it liable for the penalties denounced by the act whose provisions, through no fault of their own, they will not be able to obey; to brand petitioner, who relied upon and

obeyed the law as construed for it as a law-breaker and to take its property for yielding obedience to that law as so construed.

The proviso is plain; its language cannot be misapprehended; its meaning is clear. The legislative fiat is "This act shall not apply * * *," and we confidently believe that this court will find itself constrained to so declare.

> "The apparent and natural meaning of the terms of a statute is always to be preferred to any curious hidden signification deduced by the reflection and ingenuity of acute and powerful intellects. Where the language of a statute is unambiguous, and its meaning plain, no room is left for construction. Congress had the right and power to prohibit the application of all or of only a part of the provisions of the act in cases of casualty, unavoidable accidents, or the acts of God, and it made no exception."
>
> (*U. S.* v. *Mo. Pac. Ry. Co., supra.*)

Respectfully submitted,

ALEXANDER BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
A. S. HALSTED,
Attorneys for Petitioner.

APPENDIX.

Extracts from Congressional Record Showing Some Amendments Indicating Suggested Changes in Wording of Proviso and Remarks Indicating Purpose of Proviso.

(Figures in parentheses refer to volume and page of Congressional Record.)

Senate Proceedings.

On March 15, 1906, during the first session of the fifty-ninth Congress, Senator La Follette introduced S. B. 5133 which, as modified by various substitutes and amendments, is the present Hours of Service Act. The bill, which, as originally introduced, invested the Interstate Commerce Commission with full power to prescribe the hours of service of employees connected with train movements, was referred to the Committee on Education and Labor. (Vol. 40, p. 3838.)

Amendments Proposed.

On June 26, 1906, said committee, through Senator Dolliver, by its report No. 4246, submitted by way of amendment a substitute bill which fixed the maximum of service of employees engaged in the movement of trains at sixteen hours instead of leaving it to the

commission, and which contained the proviso following:

> " * * * except when by casualty occurring after such employee has started on his trip he is prevented from reaching his terminal; * * * "
>
> (Vol. 40, p. 9259.)

On June 27, 1906, Senator Gallinger proposed as an amendment to the proviso last quoted, the following:

> "Except when by unavoidable accident, or act of God, or resulting from a cause not known to the carrier or its agents in charge of such employee at the time he left the terminal."
>
> (Vol. 40, p. 9363.)

On June 27, 1906, Senator La Follette proposed an amendment adding to the last three amendments submitted by Senator Gallinger the words:

> "or by unknown casualty occurring before he started on his trip."
>
> (Vol. 40, p. 9372.)

Senator Foraker had theretofore proposed an amendment making the proviso read:

> "Except when by casualty occurring after such employee started on his trip, but is prevented from reaching his terminal."
>
> (Vol. 40, p. 9265.)

On January 8, 1907, Senator Dolliver offered an amendment which while eliminating the pro-

viso and making the provisions of the act absolute, delegated to the Interstate Commerce Commission authority, after full hearing and for good cause, to "specify the extraordinary circumstances or special cases" under which common carriers might be exempted from the provisions of the act. (Vol. 41, p. 767.)

On the same day Senator Gallinger proposed an amendment adding to the bill a new section reading:

> "Sec. 5. That nothing in this act shall be construed to prohibit or in any way interfere with the employment, with their consent, of men whose hours of labor are affected herein, upon runs, single or turn, which, in the reasonable judgment of the officers of the respective railroads and of the men so employed, can be completed in the ordinary course of business of the carrier, within sixteen hours."
>
> (Vol. 41, pp. 757, 828.)

On January 9, 1907, Senator Brandegee presented his amendment in the nature of a substitute for the pending bill, which prohibited service of more than sixteen consecutive hours:

> "except when on account of an emergency, which by reasonable care on the part of such carrier, its officers or agents, could not have been avoided, he is prevented from reaching his terminal. * * *"
>
> (Vol. 41, p. 828.)

On January 10, 1907, Senator McCumber submitted an amendment adding to the amendment proposed by Senator Dolliver the words following:

> "or except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal."

Senator Bacon offered an amendment containing the words:

> "except when on account of emergency, which by reasonable care on the part of such carrier, its officers or agents, could not have been avoided, he is prevented from reaching his terminal."
>
> (Vol. 41, p. 888.)

On January 10, 1907, Senator La Follette offered a substitute bill which contained the proviso following:

> "except when by *casualty occurring after* such employee had started on his trip or by unknown casualty occurring before he started on his trip, he is prevented from reaching *his terminal.*"
>
> (Vol. 41, p. 896.)

Senator Gallinger then moved to amend the foregoing so as to make it read:

> "except when by unavoidable accident, or act of God, or resulting from a cause not known to the carrier or its agent in charge

of such employee at the time he left the terminal."

(Vol. 40, p. 891.)

Senator Scott, "at the request of a number of engineers," proposed to add at the end of the bill the following:

"This act shall not apply to cases where a continuance on duty beyond sixteen hours will enable an employee to reach a terminal; provided, that at the expiration of sixteen hours he is within twenty miles of such terminal."

(Vol. 41, p. 893.)

During the pendency of the bill in the Senate twenty-five or more amendments, most of which bore upon the proviso, were proposed, eight of which were offered by Senator La Follette, who on January 10, 1907, offered a substitute, with the proviso amended as suggested by Senator Bacon, worded as follows:

"except when by casualty occurring after such employee has started on his trip, or by unknown casualty occurring before he started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal"

(Vol. 41, p. 895.)

Remarks of Senators.

On June 26, Senator McCumber, in commenting upon the necessity of the proviso, said:

"* * * In the western section of the country, * * * where you may run probably two hundred miles without finding any place where it is desirable for employees to live, it is necessary to run closely on time, and also to make extremely long runs in order to get from one important place to another important place, or such a place as any one would want his home to be.

The times and schedules are so arranged that on the whole there would be very little difficulty or very little danger of overrunning the sixteen hours, which is the limit prescribed by this bill, but we will suppose that on a westward run * * * a train would be belated, not by reason of what we would denominate a casualty, but because of a lack of steam or because at certain seasons the amount of freight traffic would be so heavy that the whole train crew would be delayed possibly one or two hours, or even ten minutes, and could not reach their destination within the sixteen hour limit. Under the bill as it now reads, unless the delay were by reason of some unlooked for accident or casualty the conductor could not run his train ten minutes longer to get home. The crew could not pull in the train to where it was to be made up or start again with a new crew, but it would be necessary to ship out another crew fifteen or twenty or fifty miles and the train would have to be held up at a way station that long in order to get another crew there to take the train from where it was. * * * When you are crossing the continent you have to go over bare stretches of country, and in order that the employees and their families may have a liveable place for residence they have got to make, sometimes, more

than a twelve-hour run. * * * If the train should be delayed five hours by reason of * * * anything that does not amount to a casualty, the crew would not get to their homes that night, but would have to tie up and abandon the train out on the prairie somewhere. I have not heard the slightest complaint on the part of employees on those vast stretches of country that they were compelled to work too long hours. * * * Ninety per cent of them would rather spend the extra hours with the train.

I might mention a great many objections that trainmen * * * have in being deprived of going through to their homes at the end of their journey, though they may be one or two or five or six hours late. Every one of them would prefer to do that and especially on a passenger train."

(Vol. 40, pp. 9263, 9264.)

On the same day Senator Warren said:

"It seems to me that in consideration of the well-known fact that there are a great many contingencies and incidentals and intricate details that come up in railroad business, impracticable to regulate by legislation, we ought to feel safe in leaving it to railroad employers and employees and let them continue to mutually arrange it, so long as they are agreed and make no complaint here or elsewhere. * * * But I am not going to oppose the principal or alleged purpose of the bill, but I do demand that the bill shall be radically changed and in the interest of the trainmen themselves. * * *

* * * You sometimes have the entire road tied up and * * * you either have to take out on the road men who have had less than ten hours rest or have to hold trains and get further and further behind and further demoralized. * * * I say it is impracticable in the interest of the railway men themselves to pass such a law without proper amendment and some elastic provision. * * *

The railroad must depend upon the regular men who have regular runs, and lengthen the hours of work and shorten the hours of sleep, when they get in a tight place, which ought to seldom happen, and I think it ordinarily does happen seldom."

(Vol. 40, pp. 9264-5.)

Senator Foraker said:

" * * * I think the first provision prohibiting their employment for a longer period than sixteen hours is guarded by the exception of casualty, in cases of accident, where there is unexpected delay. I suppose that any kind of unexpected thing happening making necessary their employment for a longer time would come within this provision of the proposed statute, and with that I am satisfied."

(Vol. 40, p. 9265.)

Senator Bailey, in suggesting a revision should be made for twelve instead of sixteen hours' service, said:

"Surely when we permit in an extraordinary emergency the extension of the time

limit, we ought to reduce it to twelve instead of sixteen hours."

(Vol. 40, p. 9265.)

On June 27, 1906, Senator Gallinger directed attention to the statements of numerous railroad officials which pointed out that:

"It is impossible to keep a sufficient number of men in the service during the light months to protect the traffic offered during the heavy months, because such a large number of men could not make a living, and would not, therefore, remain idle, or partially idle during the light months. * * * It (the bill) would cause idleness of a considerable number of engines while the crews are waiting for rest. It would, in many cases, require livestock to be held in the cars while the crew is taking a rest between terminals, or until a crew could be sent out to make the relief. * * * I do not believe that the representatives of the men would approve these bills so drawn, because if such bills are passed it will in many cases deprive these men of the right to take their lay-over at their home station; in fact, it would in many cases require that they be stopped for rest within a few miles of their homes."

(Vol. 40, p. 9363.)

On June 29, 1906, Senator Gallinger said:

"It is in very exceptional cases that a railroad requires sixteen hours' service, the rule being that the men are not overworked."

(Vol. 40, p. 9667.)

Senator Carter remarked:

> "Emergencies we cannot legislate to meet; emergencies must be met by men as best they can meet them."
>
> (Vol. 40, p. 9667.)

On the same day Senator Carter directed attention to the statements made by representatives of the trainmen before the Industrial Commission, in which appears the statement of Mr. F. B. Sargent, grand master of the Brotherhood of Locomotive Firemen, following:

> "You cannot put railroad men in the transportation department upon the same basis upon which men work at trades in factories and shops. The handling of transportation is an entirely different matter. For instance, I am called today to go out upon a run. I am on duty thirty-six hours before I am relieved. Certain conditions may arise, as have this year to my knowledge—storms and conditions of weather—whereby the men are on duty for thirty-six hours before they are relieved from their engines. *Those are conditions that cannot be controlled by any specific law or regulation.* We believe that there is manifest on the part of the railways a disposition to be as fair and equitable in the establishment of hours of labor for train service employees as is practicable with the business to handle. At the present time the railroads are flooded with business and the men are working constantly, you might say, many of them under very severe strain. If a man is not able to go out, does not feel that he can go, as a general rule he

has no trouble in getting excused if they have a man to place in his position. Oftentimes trains are held while the men get a sufficient amount of rest to go and perform their duty. * * * The men in the railway train service do not want an overproduction; they do not want the railroads loaded down with a great army of men in order that they may have it easy the whole year round. * * * They are willing to take it rougher and work a little harder in the busy season, then when the dull season comes there is plenty of time to rest up and earn fair wages. *The railroad employees have an understanding with the employers that there shall be no more men employed than is necessary to move the traffic with dispatch,* and during the busy times they take advantage of it and earn big wages, and when the dull season comes of course they earn an average wage. * * * The train service with which I am associated—the firemen—are not seeking any legislation to reduce the hours in which they work * * * There is no serious complaint at the present time * * * *The necessity of changing train and engine crews at established points where terminal facilities are provided renders it impracticable to arbitrarily fix the hours of labor of train and engine men.*" (Our italics.)

(Vol. 40, p. 9670.)

On January 8, 1907, when proposing his amendment, Senator Gallinger, in support thereof, offered numerous letters from organizations and representatives of enginemen and trainmen opposing the bill and which contain

such expressions as "it would in many cases be a hardship on engineers to get within a few miles of home sometimes and have to stop for rest," and "any legislation which will make it necessary for the employees in the train service to spend their rest time away from home instead of at home and with their families is a serious one and should be very earnestly considered before it is passed," and in referring to such protests of the men Senator Gallinger said:

> "They prefer to work a short time over the sixteen hours and to return to their homes and then to have the day off at their homes enjoying the companionship of their families. * * * All that my amendment contemplates is to permit the railroad companies, with full consent of their employees, to allow trifling additional time on a run where ordinarily sixteen hours is a sufficient time in which to make the run. * * * We do not want a rule so exacting, so inelastic, that it will work to the disadvantage of the very men whom we are attempting to legislate for. * * *"
>
> (Vol. 41, pp. 757, 758.)

Senator Warren, in speaking on the proposed bill, said:

> "I have been receiving hundreds of letters about it. I have between 100 and 200 letters and telegrams here now on my desk from employees of western railroads, every one of them protesting against the bill in its form as before us. (At pages 759-762

several of such letters are set forth and commented upon, and Senator Warren said further): All of these letters, while directed to the defeat of the measure, are in my mind so directed because of the lack of flexibility of the bill. * * * In my judgment these men * * * would readily support a bill, as I would, * * * if the bill should be so framed that such a law could be enacted as would provide for all of these contingencies * * * and leave it so that trainmen and superintendents might have some 'elbow room' in the running of trains."

(Vol. 41, pp. 758-762.)

Senator McCumber, in discussing the bill, said:

"The only question so far as it affects the section of the country from which I come is the question that crystallizes around this word casualty. * * * If it should so happen that without this broader term of the happening of a 'casualty' a train would be delayed, certainly we ought not to make it a criminal offense if the men were required to remain over a little more than sixteen hours from the time that they had had rest or that they could go out again upon a less number of hours' rest than ten hours, which the bill now provides. I hope, Mr. President, we shall so amend this bill that it will have sufficient elasticity to meet occasions of this kind."

(Vol. 41, pp. 762-763.)

Thereupon Senator Patterson said:

"So far as the objections made by the senator from New Hampshire (Mr. Gallinger) is concerned, I doubt if it is amply provided against in the bill. I can hardly imagine any cause for a delay in a trip one way or a round trip, that would not be covered by the term 'casualty.' So that if a train starts out on a round trip that would under the schedule be completed in twelve or thirteen or fourteen hours, if, for almost any cause, it was delayed beyond sixteen hours, there would be no necessity for the employees abandoning the train and a new crew being put in their places, for it is only in the event of a casualty interfering to prevent the completion of the run within the sixteen hours that the crew may not continue on the run *until the run is finished.* * * * If the locomotive should run out of coal, or if water should not be accessible, or if a rail should be misplaced, or a freight train or any other kind of a train should run off the track, I am inclined to think that that mishap would come under the term 'casualty.' * * * Perhaps a broader term might be used, *but a fair construction, it seems to me, would prevent the companies being compelled to change train crews under the term that is used in the bill, whatever might be the cause of delay.*"

(Vol. 41, p. 763.)

Thereupon Senator Heyburn remarked:

"A lay-over at a point of a wreck, miles distant from any settlement, would not afford the crew of the train an opportunity to rest. It could not possibly result in any

benefit to them in the way of re-equipping them for further service; and there should be such elasticity in this measure as would permit those men to pursue their duties. But to say that a crew of railroadmen shall remain in idleness at a point of disaster which may not have occurred within the scope of the exception of this bill—and I can imagine many of them that would not be within that exception of 'casualty'—to say that they must lie there in idleness and practically afford no assistance to relieve against the damage or delay, would certainly be of no benefit to the railroad or men and would tend nothing to accomplish the purpose sought to be accomplished by this bill. The word 'casualty,' as it has been presented by the senator from Colorado, would seem to be broad enough to cover almost any kind of delay, but the text of the bill limits it to casualty occurring after such employee has started on his trip. The cause of delay may have existed for a considerable time before the train started out on its trip. There is an amendment proposed to cure that which says 'or by unknown casualty occurring before he started on his trip.' There may be a casualty that is known to exist and the trainmen may start out for the purpose of relieving against the damage, expecting to be able to accompish the work and return within the time limited by the proposed act, and instead of being able to do so they may be detained there hours or days, as the case may be. So, as I say, in that provision the bill is not elastic enough. Otherwise, you would find yourself with a dead crew on hand where they had started out with full knowledge that there has been a landslide or a

> train ditched, or any of the many casualties which might occur, with the expectation of being able to overcome it within a few hours, and, as I have suggested, be held there for many hours and the sixteen hours might expire."
>
> (Vol. 41, pp. 764-765.)

On January 9, 1907, Senator Bacon offered communications from certain railway employees, conductors and others, requesting "that you do all in your power to so amend the bill * * * so that unavoidable and unforeseen accidents be excepted and in favor of the men that when an hour or two will get them to their home terminal be excepted * * *" and then said:

> "A railroad employee starting from his home and making, it may be, a hard run to the other terminal, is very desirous to get back to his home and have his rest there. * * * It would be better for them, looking to the question of their physical recuperation, to say nothing of their comfort and domestic happiness, if they were permitted to take the larger part of their rest at their home terminal and not be required to take an undue portion of it at the far-away terminal."
>
> (Vol. 41, p. 823.)

Thereupon Senator Dolliver, in reply to Senator Bacon, referred to his proposed amendment delegating to the Interstate Commerce Commission the power to determine the instances in which the act should not apply and said:

> "The very reason that I felt constrained to offer the amendment was the difficulty in making a particular description of the circumstances which would warrant exemption from the operation of the law."
>
> (Vol. 41, p. 824.)

Thereupon Senator Patterson offered four, out of more than one hundred, letters from trainmen, each directing attention to the fact that:

> "There are occasionally circumstances and conditions—storms, wrecks, washouts, etc.—where it is impossible for a dispatcher to prevent train and engine crews from being on duty over sixteen hours without great hardship to them and also the traveling public."
>
> (Vol. 41, p. 827.)

On January 10, 1907, immediately preceding the passage of the bill, Senator La Follette, in referring to the criticism which had been urged by Senator Patterson, said:

> "I think the criticism of the senator from Colorado is a just one. Provision should be made to meet that criticism. It seems to me that this can be done easily, and if no one offers such an amendment I shall offer one which I believe will meet that objection."
>
> (Vol. 41, p. 876.)

Which he thereupon did by offering by way of amendment a substitute bill containing a proviso reading as follows:

"except when on account of an emergency, which, by reasonable care on the part of such carriers, its officers or agents, could not have been avoided, he is prevented from reaching his terminal. * * *"

(Vol 41, p. 891.)

House Amendments.

The substitute bill offered by Senator La-Follette, which passed the Senate January 10, was sent to the House and was referred to the House Committee on Interstate and Foreign Commerce. (Vol. 41, p. 954.)

Congressman Esch has theretofore introduced in the House H. R. 18671, which contained a proviso reading as follows:

"Provided, That the provisions of this act shall not apply in any case where, by reason of unavoidable or unforeseen train accident or act of God occurring after such employee has left a terminal, he is prevented from reaching his terminal within the time specified in section one of this act."

(Vol. 40, p. 5938.)

In reporting back H. R. 18671 on May 31, 1906, the committee recommended the proviso be changed to read:

"Provided, That the provisions of this act shall not apply in any case where, by reason of unavoidable accident or act of God not known to the carrier or its agent in charge of such employee at the time he

left a terminal, he is prevented from reaching his terminal within the time specified in section one of this act."

(Vol. 40, p. 7680.)

On May 4, 1906, Mr. Esch introduced in the House another bill—H. R. 18961—of a similar nature, which made it unlawful to permit employees "to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such employee has started on his trip he is prevented from reaching his terminal." (Vol. 40, p. 6406.)

On February 20, 1907, Mr. Bede introduced House Resolution 25757, which made it unlawful to permit an employee "to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such employee has started on his trip or by unknown casualty occurring before he started on his trip he is prevented from reaching his terminal." (Vol. 41, p. 3503.)

On February 16, 1907, Senate Bill 5133 was reported back to the House by its Committee on Interstate and Foreign Commerce (See House Report 7641) and placed on the House calendar, with the proviso reading as follows:

"Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its agent in charge of such employee at the time said employee left a terminal, and which

could not have been foreseen with the exercise of ordinary prudence."

(Vol. 41, pp. 3155, 3235.)

The Senate disagreed to the amendments made by the House and requested a conference. (Vol. 41, p. 3235.)

On March 1, there was reported to the Senate by the Conference Committee the bill containing the proviso as finally enacted. (Vol. 41, p. 4348.)

During the discussion of the bill in the House Congressman Stephens, on February 18, 1907, compared the House substitute with the Senate bill, and specifically stated that the provisions authorizing the extension of sixteen hours of duty in exceptional cases are (1) that the provisions of this act shall not apply in any case of casualty, unavoidable accident or the act of God; and (2) nor where the delay was the result of a cause not known to the carrier or its agent in charge of such employee at the time said employee left a terminal which could not have been foreseen with the exercise of ordinary prudence; and further said:

> "The provisions of exceptions allowing the railroad companies to work their men more than sixteen consecutive hours are defined clearly and closely and narrowly in the House bill. The carriers are confined within the narrow and closely defined limits admitted by all to be fair and reasonable."

(Vol. 41, p. 3250.)

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

SAN PEDRO, LOS ANGELES & SALT LAKE Railroad Company, plaintiff in error,

v.

THE UNITED STATES.

No. 48.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

In this case a writ of error sued out, and a petition for certiorari presented, seek to review a judgment of the Circuit Court of Appeals for the Ninth Circuit, affirming recoveries for violations of the hours-of-service act of March 4, 1907 (ch. 2939, 34 Stat. 1415, 1416).

The original complaint charged 37 violations. Some were decided in favor of the United States and others in favor of plaintiff in error. The assignments of error, however, call in question only so much of the judgment as affirms the recovery of a

penalty of $150 for each of six violations. (Brief, p. 5.) The employees involved are a conductor and two brakemen on each of two passenger trains, known as Nos. 1 and 7, starting from Las Vegas, Nev., for Los Angeles, Cal., on October 3 and 4, 1913, respectively.

THE FACTS.

Train No. 1 left Las Vegas on October 3 and arrived at Los Angeles 27 hours later without change of conductor or brakemen. Train No. 7 left Las Vegas the next day and arrived 24 hours and 55 minutes later, likewise without change in the train crew.

The run of 334 miles, and the regular schedule, including 30 minutes' preparatory service, was, for No. 1, 14 hours (Rec., p. 100), and, for No. 7, 11 hours and 58 minutes (Rec., p. 95). The longer time consumed on these trips is accounted for by the following facts:

Train No. 1 was forced, on account of a landslide, to make a detour over the lines of other railroads at Cramer, Cal., returning to the plaintiff in error's tracks at Daggett, but not reaching that point until the men had been on duty for 16 hours and 45 minutes. (Rec., pp. 91, 92.) At Daggett the engineman were relieved, but no effort was made to relieve the trainmen. (Rec., pp. 92-93.) When the train reached San Bernardino the trainmen had been on duty 20 hours and 45 minutes. (Rec., p. 96.) No effort was made to relieve them and 2 hours and 10 minutes later the train arrived at Los Angeles with a conductor and two brakemen who had been on duty for 27 hours. (Rec., p. 91.)

Train No. 7 made the same detour at Crucero, but reached Daggett when the trainmen had been on duty only 9 hours and 20 minutes. (Rec., pp. 94, 98.) The schedule from Daggett to Los Angeles is 5 hours and 35 minutes. (Rec., p. 98.) But, after leaving Daggett, this train was delayed by a windstorm and a derailed train, so that it did not reach San Bernardino until the men had been on duty 22 hours and 4 minutes. (Rec., pp. 94, 98–99.) No effort was made to relieve them, and they reached Los Angeles after 24 hours and 55 minutes of continuous service. (Rec., p. 94.)

Otis, 4 miles from Daggett, is a freight terminal, but not a passenger terminal, though the freight crews were qualified as passenger crews. (Rec., p. 92.)

San Bernardino is a freight terminal and also a terminal for local passenger crews running between that point and Los Angeles, though it is not a terminal for through passenger trains. (Rec., p. 98.)

The crew on either of these trains could have been relieved by sending out a crew from Los Angeles, which was only 63 miles from San Bernardino. (Rec., p. 98.)

When train No. 1 left Las Vegas it was not known that the detour would be necessary. But when it left Crucero it had already been delayed 4 hours and 35 minutes, and it was then known that the run could not be made within 16 hours, and when it reached Daggett the 16 hours had already expired. (Rec., pp. 100–101.)

When train No. 7 left Las Vegas it was known that the detour would be necessary. Daggett, however, was reached in time to make the run within 16 hours. But the full 16 hours had more than expired before the arrival at San Bernardino. (Rec., p. 101.)

When train No. 1 reached Daggett there would have been crews at Otis, 4 miles away, from which a relief crew could have been drawn, but for the fact that the company chose to put them at work in connection with clearing away the landslide. (Rec., p. 96.)

In the cases of both trains there were passenger crews available at San Bernardino. The only excuse offered for not using them is that they would be needed to take out local passenger trains the next morning. (Rec. 99–100.)

The company kept men for emergencies at Las Vegas and Los Angeles, but not at Otis or San Bernardino. (Rec. p. 101.) No excuse is suggested for not sending men kept for this purpose at Los Angeles to meet the emergencies arising in the cases of these two trains.

[illegible]

The only question is whether, upon these facts, the plaintiff in error is relieved of liability under the terms of the proviso to section 2 of the hours of service act, viz:

> * * * That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not

> known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen. (34 Stat. 1415, 1416.)

The Circuit Court of Appeals held that the delay of No. 1 in reaching Daggett and that of No. 7 in reaching San Bernardino arose from causes within the terms of the proviso and that the excess time necessary to reach these points, respectively, did not constitute a violation of the act, but that, after such delay, the company was justified in continuing the crew in service only "up to the time it could with the exercise of reasonable diligence have relieved it." And the court held upon the evidence that, in the case of each of these trains—

> the defendant company had the opportunity to relieve that crew either at San Bernardino or Daggett, or both, and was, by the statute properly construed, required to avail itself of it. (Rec. p. 166.)

Brief of Argument.

I.

The casualty or unavoidable accident which justified the plaintiff in error in running its trains to Daggett and San Bernardino, respectively, although the trip required more than 16 hours, did not authorize it to continue its men in service all the way to Los Angeles if, by reasonable diligence, they could have been relieved earlier.

Atchison, etc., Ry. Co. v. *United States*, 244 U. S. 356.

II.

The exercise of reasonable diligence would have enabled the company to relieve these crews either at Daggett or San Bernardino.

III.

The amount actually in dispute being only $900, the writ of error should be dismissed; and, no unsettled question of law being involved, the petition for certiorari should be denied.

Judicial Code, section 241.

Report Lumber Co. v. Port Bangs Co., 237 U. S. 293, 289.

ARGUMENT.

I.

All the assignments of error seem to make only the contention that, where a delay has once occurred from causes which excuse a service of more than 16 hours, the act is entirely suspended for the remainder of the trip, and that, therefore, the plaintiff in error was under no legal obligation to relieve its crews, no matter what the opportunity for doing so, before reaching Los Angeles. This contention and all the arguments made in support of it are so completely met by the very recent opinion of this court in the case of *Atchison, etc., Ry. Co. v. United States*, 244 U. S. 336, that no reply is deemed necessary beyond a reference to that case.

II.

We do not understand that there is any serious insistence that, if the theory of the law as just stated is unsound, any justification of the conduct of the plaintiff in error has been shown. The trains in question seem to have been run upon the same theory upon which the case is presented in this court. An unavoidable and unforeseen delay having occurred, the company assumed that it was immune from the requirements of the act for the remainder of the trip and made no effort to relieve the situation. Incidentally, however, in the facts stated above, there is apparently a suggestion that conditions existed which furnished some sort of excuse for not making the effort. But nothing can be gleaned from those facts which could not have been overcome by reasonable diligence. The company had men at Daggett who could have relieved the crew of No. 1, but it chose to use them in connection with the work of clearing away the landslide. It had men at San Bernardino who could have relieved both crews, but it preferred to hold them for use on local passenger trains the next day. It had men, kept at Los Angeles, for emergencies, who could easily have been sent to San Bernardino, but it refused to regard as an emergency the necessity of relieving these crews. The railroad men knew for hours that these trains could not be brought into Los Angeles within the 16 hours' limit. It is admitted that it had emergency men who could have been sent out to relieve

the incoming crews. As it had not provided available men at other points, it should have dispatched these men.

The duty of the railroad, in view of the facts of this case, has been so clearly stated by Judge Denison of the Circuit Court of Appeals for the Sixth Circuit, in *Baltimore & Ohio R. R. Co. v. United States*, 243 Fed. Rep. 1, 8, that we quote:

> * * * If it is found that there was delay from an unavoidable accident, or from a cause not known to the railroad agents when the train left Newark, and which could not have been foreseen, then the railroad was entitled to add to the 16 hours all the delay, no more and no less, which thereafter occurred as the result of this cause; but it was entitled to do so only if the jury found the existence of all these conditions: (a) That from the beginning of the trip, and even before it became apparent, or should have become apparent, to the train dispatcher that there was danger of not finishing the trip within the time, the railroad used reasonable diligence to avoid delays; (b) that as soon as it became apparent, or should have become apparent, that there was any danger of not getting through on time, the railroad used a very high degree of effort or extreme diligence to get the train through to the end of the run within the time limit; (c) that as soon as it became fairly probable that excess service would otherwise be necessary, the railroad used that same high diligence to prevent excess service, either by laying up the train or by sending relief or in

any other practicable way; (d) that continually and until the service ended the railroad used the same high diligence and by the same means to the end that the excess service, if any, should be as short as possible.

It is manifest that the only real reason they were not relieved was that the company deliberately decided that it would take its chances on the unsound theory of the law presented in its brief in this cause.

III.

The amount actually in dispute is only $900, and this court is, therefore, without jurisdiction of the writ of error.

Judicial Code, section 241.

Export Lumber Co. v. *Port Bengal Co.*, 237 U. S. 362, 369.

No question of law not already clearly determined by this court is involved and the petition for certiorari should be denied; or, if granted, the judgment should be affirmed.

WILLIAM L. FRIERSON,
Assistant Attorney General.

S. MILROY SHEFFIELD,
Attorney.

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